Jurisprudence and Its Principles

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Translator's Introduction

In the Name of God the Merciful, the Compassionate

The importance of the holy Shari'ah of Islam is crucial. By means of it, human beings know exactly how to live in harmony with his or her Creator, with the rest of mankind, and with the rest of creation.

If we look at the proceedings of the material universe, we realise that the planets and forces of nature are all bound by fixed laws that ensure the material creation's symmetry. The animal world is also bound by such laws, and, even though animals are motivated only by their natural, "base", "worldly", "material" instincts, they too contribute to the symmetry and harmony of this planet.

The world of human beings, however, is a general exception to these observations. Reflection on the proceedings and the methods of human beings in the world shows that they are in no way in harmony with the symmetry of the universe around them. On the contrary, it shows them to be all but striving to disturb and disrupt that symmetry.

To the religiously minded, therefore, it should come as no surprise that God has provided, for those of His human creatures who desire to worship Him and serve Him, an orderly system whereby their lives can match the order and symmetry of the rest of creation, especially when it is borne in-mind that, now and in the future more than ever, the symmetry of the rest of creation depends on symmetry in the life of human beings. That is, if human beings do not quickly adopt the system wherein lies the means of their life becoming orderly, the system which Islam calls the Shari'ah, much of the order of the creation will vanish.

The Shari'ah of Islam in as much as it is a Shari'ah, or a system of legislation, is not particuiar to Islam; rather in its earlier stages it was a part of the other divinely founded religions. Noah, Abraham, Moses, and Jesus, upon them all be peace, were all commanded to convey to their followers the Shari'ah that had been perfected to the point suitable for their respective times and locations. The Shari'ah of Islam is particular to Islam, however, in that it was entrusted to the Holy Prophet for he and his followers to follow, and in that it will remain unchanged and binding on God's servants until the day of judgment.

In the Quran, the Holy Prophet, and, tacitly, mankind, is told: "*Then we placed you on a Shari'ah of the affair (religion), so follow it.*" (45:18) And, whatever the circumstances in which this verse was revealed, the meaning of the word Shari'ah here is the same as is understood today, i.e. the divine legislation of Islam.

In another place the Prophet is told to. Tell his followers: "*If you love God, follow me; God will love you.*" (3:30)

From these two verses the Muslim realises that it is incumbent on those who desire to obey God and to be loved by God to follow the Shari'ah of Islam as introduced and

practiced by the Holy Prophet and his true fo!lowers. The only problem is the determining of the Shari'ah, for the Shari'ah was not revealed for mankind as the Quran was revealed, and unless the Shari'ah is properly identified it can never be properly followed.

This identifying of the Shari'ah, then, in the light of the Quranic command to follow it, is the purpose of the two Islamic sciences of Jurisprudence (*fiqh*) and the Principles of Jurisprudence (*usul ul-fiqh*) which are outlined in the present translation. The aim of this work is to acquaint the reader with the Shari'ah and how it is realised.

The original book was in Persian, and in translation it has been slightly abridged to suit a different readership. The translator owes his thanks to his wife, most of all for her encouragement, and to Syed Mohammad Rizvi for his ready and valuable assistance in editing the first part of the draft. This translation is dedicated to those who will make good use of it.

Mohammad Salman Tawheedi
Qom,
Islamic Republic of Iran 27th Rajab 1401

Editor's Note:
The Arabic word fiqh, translated as jurisprudence throughout the book, in order to facilitate the reading of the text, actually means, according to the author, "precise and profound deducing of the Islamic regulations of actions from the relevant sources". This definition should be kept in mind by the reader for jurisprudence in the Islamic perspective is based on the divine principles of the Holy Quran and are not man-made laws in the sense of western jurisprudence. In the same way, a jurisprudent (*faqih*) in Islamic terminology is a person trained in the traditional Islamic sciences, meaning that a jurisprudent, in this sense, is a master of the Quran and the divine commands regulating actions.

Laleh Bakhtiar Shawwal, 1401

Part I

The Principles of Jurisprudence (*usul al-fiqh*)

Lesson One: Introduction

The subject under consideration here is the '*ilm*, or knowledge of the principles of jurisprudence, *usul ul fiqh*. The two studies of jurisprudence and its principles are interconnected. They are interconnected in the same way, as will become clear, as the two studies of logic and philosophy are interconnected. The study of the principles is tantamount to a preparation to the study of jurisprudence, and it is for this reason that it has been named the principles of jurisprudence, for the word *usul* means roots or principles.

Firstly, a short definition of these two studies must be given.

The Arabic word, *fiqh* essentially means understanding, profound understanding. Our information about the affairs and proceedings of this world can be of two types. Sometimes it is shallow, surface information, and sometimes it is profound. An example from economic affairs will help us. We are continually experiencing the fact that products which years ago did not exist are now finding their way onto the market place, while at the-same time a chain of products that were previously abundant cannot now be found. Likewise, the prices of certain products regularly increase, while the prices of other goods, let us suppose, is fixed.

This type of information is universally available and is shallow, surface information. The information of some people on these matters is profound, however, and they have journeyed from the mere experiencing of the events to a profound understanding of the causes, meaning that they are aware of the reason for a certain article becoming available and another article becoming unavailable, and of the reasons for a certain product being expensive and a different one being inexpensive. They know what causes prices to regularly increase, and they know to what extent these causes are essential, definite and unavoidable, and to what extent they can be checked.

When the information of a person in economic affairs is such that it passes the level of simple experiencing and arrives at the level of discerning the deep-rooted causes and profound currents, he can be said to be a person having deep understanding (*mutafaqqeh*) in economics.

In the Holy Quran and in Traditions from the Holy Prophet and the Imams, we have been repeatedly commanded towards profound understanding (*tafaqqah*) in the religion, and from the collective content of these sources it is to be discerned that the view of Islam is that Muslims understand Islam, in all its aspects, profoundly and with thorough insight. Of course profound understanding in religion, consisting of all the Islamic aspects, is a great blessing from God. It is common to what relates to the principles of Islamic beliefs and the Islamic world-view or sense of values, to Islamic morals, ethics and upbringing, to all the aspects of Islamic society, to Islamic worship, to the civil ordinances of Islam, to the particular Islamic customs of the individual and of the society, and more. However, since the second century of the Hejra, the word

jurisprudence has become a term for a special area of understanding amongst Muslims that can be said to be jurisprudence in the commands of religion or jurisprudence in the deducing of the commands of religion. In other words "precise and profound deducing of the Islamic regulations of actions from the relevant sources".

The commands or regulations of Islam have not been explained by the Quran or by the Prophet and the Imams in such a way that each and every particularity has been expressly dealt with. Nor is such a thing possible, for events and situations occur in endlessly different forms. Instead, generalities and precepts have been laid before us in the form of a chain of principles.

A person who wants to explain the law of a certain matter to himself or others, must refer to the resources and authentic documents-and later we will clarify the nature of these-and must explain his viewpoint while bearing in mind all the different aspects of those authentic documents. And it is this that is meant by jurisprudence being joined to precise and profound understanding of all aspects.

The masters of jurisprudence (*fuqaha*) when defining jurisprudence, use the following sentence: Jurisprudence is the study of the secondary commands (i.e. not the principle matters of beliefs and moral perfection, but the commands regulating actions) of the Shari'ah of Islam gained from the detailed resources and proofs.

The Principles of Jurisprudence
For the study of jurisprudence, mastery of many other branches of learning are necessary as a preparation, and these consist of the following:

1. Arabic: syntax, conjugation, vocabulary, semantics, oratory as the Quran and Traditions are in Arabic, without knowing at least the usual standard of the Arabic language and literature it is not possible to benefit from the Quran and the Traditions.

2. Commentary upon the Holy Quran (*tafsir*). Taking into consideration the fact that the jurisprudents must use the Quran as a point of reference, some knowledge in the study of the commentaries upon the Quran is absolutely essential.

3. Logic, called *mantiq* in Islam. Every branch of learning in which reasoning is used stands in need of logic.

4. The study of the Traditions. The jurisprudent must have a sound knowledge of the Traditions and must be able to distinguish the different types of Traditions and they become acquainted with the language of the Traditions as a result of their frequent application.

5. The study of the Transmitters (*rijal*). The study of the Transmitters means knowing the identities and natures of those who have transmitted the Traditions. Later it will be explained how the Traditions existing in the sanctuary of books of Traditions cannot be accepted without examination. The study of the Transmitters is the examining and scrutiny of the men who make up the chains (*isnad*) of reporters of the Traditions.

6. The study of the Principles of Jurisprudence. The most important branch of learning in preparation for jurisprudence is the principles of jurisprudence, a delightful subject and one originated by Muslims.

The Principles of Jurisprudence is, in reality, the "study of the rules to be used in deducing the Islamic laws" and it teaches us the correct and valid way of deducing from the relevant sources in jurisprudence. In this way, Principles, like logic, is a study of instructions, and is more a skill than a branch of knowledge, meaning that in jurisprudence, that which is discussed is a chain of things that must be, rather than a chain of things which are.

Bearing in mind the fact that it is possible to refer in particular ways to the documents or sources of jurisprudence and to be led to erroneous deductions opposed to the real view of the Islamic Shari'ah, it is necessary for there to be a special field of study that enables one to clearly discern the correct and valid method of using the sources of jurisprudence as a reference to deduce and extract from them the laws of Islam by means of the proofs of reasoning and the proofs provided by God through the Prophet and the Imams. The Principles of Jurisprudence is the field of study that fulfils this purpose.

From the early days of Islam, another word that is more or less synonymous with the word *fiqh* (jurisprudence) and which has been in common use amongst Muslims is the word *ijtihad*. In the Muslim world today, especially the Shi'ite world, the words *faqih* (jurisprudent) and *mujtahid* are synonymous with each other.

The word *ijtihad* is from the root *juhd* which means utter striving. For this reason, a *faqih* is also called a *mujtahid*, since he must use all his efforts in deducing Islamic laws (*ahkam*).

Lesson Two: The Sources of Jurisprudence

In the previous lesson we learned how the study of the principles of jurisprudence teaches us the correct and valid instructions and methods of deducing the laws of the Shari'ah, the divine law of Islam, from the original sources. Now we must learn what those sources are, and how many they are, and whether all the sects and schools of Islam have the same views about each detail of the sources or whether they hold opposing views. If there are differences, what are those differences? First we will discuss the views of the Shi'ite jurisprudents on the sources of jurisprudence and, while explaining each of the various sources, we will also discuss the views of the 'ulema of the other Islamic sects. In the view of Shi'ites (with the exception of a small group who are called *akhbariyin*, the views of whom will later be discussed), there are four sources for jurisprudence:

1. The Book of God, the Quran, which will from here on be referred to in the concise term of the jurisprudents as "The Book".

2. "Sunnah", meaning the words, actions and silent assertions (*taqrir*) of the Prophet and the Imams.

3. Consensus or *ijma'*.

4. Reasoning or *'aql*.

These four sources in the terms of the jurisprudents are called the "four proofs" or the *adillat ul-arba'ah*. Generally they say that the study of jurisprudence is centered around these four proofs. Now, it is necessary for us to give an explanation of each of these four sources and at the same time explain the views of the other Islamic sects and likewise those of the *akhbariyyin*. We will begin our discussion with the Quran.

The Quran

There is no doubt that the Holy Quran is the first source for the laws and regulations of Islam. Of course the ayah or verses of the Quran are not limited to laws and regulations. In the Quran, hundreds of different types of issues have been introduced, but a part of the Quran, said to consist of about five hundred ayah, from a total of six thousand, six hundred and sixty, i.e. roughly a thirteenth of the Quran, pertains especially to the laws.

From the early days of Islam, Muslims have always used the Quran as the primal point of reference in order to deduce Islamic laws. However, about the same time as the rule of the Safavid dynasty there appeared in Iran a sect manifesting the view that the right of ordinary people to refer to the Quran is forbidden, and they claimed that only the Prophet and the Imams have this right

In the same way, this group also considered the refer-ral to consensus and reason as being unpermissable, holding that consensus had been introduced by the Sunnis, and that the use of reason is open to error and thus unreliable. In this way they maintained the Sunnah to be the sole source of reference. It was for this reason that they were called the *akhbariyyin* for *akhbar* means tradition.

This group, by denying the right of referral to the Quran, consensus and reasoning, were essentially denying *ijtihad*, for *ijtihad*, as has been stated, means precise understanding and profound deducing, and it is evident that profound understanding is not possible without making use of reason. This group came to believe that ordinary people, without the medium of a group known as mujtahids, must refer to the traditions for guidance in their daily affairs and actions, just as today they refer to the treatises of the mujtahids. [1]

The appearance of the *akhbariyyin* and the large numbers that were attracted to them in some cities in the south of Iran and islands of the Gulf and in some of the holy cities of Iraq, was the cause of severe decline. Fortunately, however, with the noteworthy and laudable resistance of the *mujtahid*s of the period, their penetration was firmly checked. Today, apart from a few scattered places, their theories are largely non-existent.

The Sunnah

The Sunnah means the words, actions and assertions of the holy Prophet and the Imams. Clearly it is evident that if by the Holy Prophet a certain law has been verbally explained, or if it is determined how the Prophet performed certain religious obligation, or if it is realised that others used to perform certain religious duties in his

presence in a certain way which would earn his blessing and approval, meaning that by his silence he actually gave his endorsement, this is sufficient proof (*dalil*) for a jurisprudent to consider the action in question to be the actual law of Islam.

About this definition of Sunnah, and it being binding (*hujjat*) there is no question of argument and no scholar opposes it. The differences that exist on the subject of the Sunnah concern two points. One is the question as to whether only the Sunnah of the Prophet is binding or whether the Sunnah related by the pure Imams is also binding. Our Sunni-Muslim brothers only consider the Sunnah of the Prophet as binding, but the Shi'ites also refer to the words, actions and silent approvals of the holy Imams, in accordance to the traditions of the Prophet which even Sunni Muslims have related and recorded. One of these traditions is this one wherein the Prophet has undoubtedly told us: "I leave behind me two valuable things to which you are to refer, and God forbid that you not refer to them: the Book of God and the people of my House."

The second point is that the related Sunnah of the Prophet of God and the pure Imams is sometimes clear and multi-related, i.e. there are different chains of narrators of the same Tradition, and sometimes suspicious, or, to coin a phrase, a Single Report (*khabar al-wahid*).

Here the different views vary to an extent that is an excessive exaggeration. Some, like Abu Hanifa, a jurisprudent of one of the four Sunni schools, paid scant attention to the related Traditions; it seems that from all the thousands of Traditions narrated from the Holy Prophet, he considered only seventeen to be reliable.

Others have found confidence even in "weak", unreliable Traditions. But the Shi'ite 'ulema are of the opinion that only reliable traditions are to be given credence. That is, if the people who make up the chain of narrators, called the *musnad*, are Shi'ite and just, or at least truthful and reliable, then the Tradition itself can be relied upon. So we must know the narrators of the Traditions and must research into their conditions, and, if it becomes determined that all the narrators of a Tradition were truthful and reliable, we rely upon that Tradition.

Many of the 'ulema of the Sunnis have this same idea, and it is for this reason that the study of the Transmitters exists among them. The *akhbar*i Shi'ites, however, who we have mentioned, considered the division of Traditions into the divisions of valid and weak as being uncalled for, and said that all Traditions are reliable, especially those contained in the reliable books. This extreme [2] view is also held by some of the 'ulema of our Sunni brothers.

Consensus

Consensus means the unanimous view of the Muslim 'ulema on a particular issue. In the opinion of the Shi'ite 'ulema, consensus is binding because if all the Muslims have one view, this is proof that the view has been received from the Holy Prophet.
It is impossible for all Muslims to share the same view on a matter if it came from themselves, and thus their consensus is proof of the origin of that view being the Sunnah of the Prophet or an Imam.

For example, if it is clear that on one subject all the Muslims of the Prophet's era, with no exceptions, had a certain view and have performed a certain type of action, this is

proof that they were taught it by the Holy Prophet. Likewise, if all the companions of one of the pure Imams who took instructions from none but the Imams all had an identical view about something, this is proof that they acquired that view from the schooling of their Imam. Therefore, in the Shi'ite view, consensus goes back to the Sunnah of the Prophet.

From what has been stated we learn two things:

First, in the Shi'ite view, only the consensus of the 'ulema of the same period as the Prophet or Imams is binding. So, if in these times of ours a consensus occurs about something between all the 'ulema with no exception, this is in no way binding for subsequent 'ulema. Second, in the Shi'ite view, consensus is not genuinely binding in its own right, rather it is binding in as much as it is a means of discovering the Sunnah.

In the view of the 'ulema of our Sunni brothers, however, consensus is a proof in its own right. That is, if the 'ulema of Islam, in their view the management of Islam, are all in agreement upon a certain point of view about a subject in one period (even this period of ours), their view is definitely correct. They claim that it is possible for some of the nation to err, and some not to, but it is not possible for all of them to be in agreement and err.

In the view of our Sunni brothers, complete agreement of all the Muslims in one period is ruled as divine revelation, and thus all the Muslims, at the moment of consensus, are ruled as Prophets, and that which is revealed to them is the law of God and cannot be wrong. [3]

Reason

The binding testimony of reason in the Shi'ite view means that if in a set of circumstances reason has a clear rule, then that rule, because it is definite and absolute, is binding.

Here the question arises as to whether the laws of the Shari'ah are in the domain of reason or not, and to this question we will give an answer when we discuss the generalities of the Principles.

As for the *akhbariyyin*, whom we have discussed and whose ideas we have shown, they in no way count reason as binding.

Amongst the 'ulema of our Sunni brothers, Abu Hanifa considered analogy (*qiyas*) to be the fourth proof, and thus in the view of the Hanifa sect, the sources of jurisprudence are four: the Book, the Sunnah, consensus and analogy.

The Maliki and Hanbali Sunnis, especially the Hanbalis, pay no heed whatever to analogy. The Shaf'i Muslims, following their leader, Muhammad ibn Idris Shaf'i, pay more attention to Traditions than the Hanafis and also more attention to analogy than the Maliki and Hanbali Muslims.

The view of the Shi'ite 'ulema, however, is that because analogy is pure conjecture and surmissal, and because the total of what has been received from the Holy Prophet

and the Imams is sufficient for our responsibility, the referral to analogy is strictly forbidden.

Lesson Three: A Brief History

For a student who wishes to study or gather information about a certain branch of learning, it is necessary that he acquaints himself with the origins of that learning, with those who introduced it, with the nature of its development over the centuries, with its notable champions and exponents and with its famous and creditable books. The study of Principles is one of the studies that was originated and brought up in the surroundings of the culture of Islam. It is generally recognised to have been introduced by Muhammad ibn Idris Shaf'i. Ibn Khaldun in his famous *Muqaddamah*, in the section in which he discusses the various sciences and skills, tells us, "The first person in the study of the Principles of Jurisprudence to write a book was Shafi'i, who wrote his famous Treatise. In that treatise, he discussed the commands and prohibitions, the Traditions, abrogation and other matters. After him, the Hanifi 'ulema wrote similar books and brought extensive research into practice."

However, as has been pointed our by the late Seyyid Hasan Sadr, may God raise his station [4], various problems of Principles, such as the commands and prohibitions and "generalities and particularities" had previously been raised by Shi'ite 'ulema who had written a treatise about each one of them. So perhaps it can be said that Shafi'i was the first person to write one book about all the issues of Principles that, by his time, had been raised.

Likewise, it has been considered by some orientalists that *ijtihad* began amongst the Shi'ite some two hundred years after it began amongst the Sunnis; a view they base upon the assumption that during the time of the pure Imams there was no need amongst the Shi'ites for *ijtihad* and that as a result, there was similarly no need for the preparatory studies of *ijtihad*. This is a view, however, that is in no way correct.

Ijtihad, in the proper meaning of deducing the consequences (i.e. legislation) of faith from the sources - meaning referring the consequences, or legislation to the sources, and applying the sources to the legislation-has existed amongst Shi'ites ever since the time of the pure Imams, and the pure Imams used to command their companions to engage themselves in this practice.

Furthermore, due to the numerous Traditions about different subjects that have been narrated from the pure Imams, Shi'ite jurisprudence has naturally been considerably enriched, and thus the struggles of *ijtihad* are somewhat easier. At the same time, however, Shi'ite Islam has never considered itself to be free of the need of *tafaqquh* and *ijtihad*, and as has been said, the instructions to carry on the struggle of *ijtihad* were especially given by the Imams to their outstanding companions. In reliable books the following sentences has been recorded from the Imams: "Upon us is the (general) rules (i.e. the general rules are the responsibility of the Imams) while upon you is the application (i.e. the application of the rules in all the particular circumstances is our responsibility)."

Amongst Shi'ite 'ulema, the first outstanding personality to compile books on Principles and whose views were discussed in Principles for centuries was Seyyid

Morteza 'Alam ul Huda Numerous books on Principles were compiled by Seyyid Morteza, the most well-known of which is *Thariyah* (The Medium).

Seyyid Morteza was the brother of Seyyid Razi who was the compiler of the famous *Nahj ul-Balagha*, the book of sermons, letters, and sayings of Hazrat Ali rightly called the Way of Eloquence. Seyyid Morteza lived during the late fourth and early fifth centuries A.H. He died in 436 A.H. He had been the student of the famous *mutakallim*, or master of theology (*kalam*), Shaykh ul-Mufid (died 413 A.H.), who in turn had been the pupil of the equally famous Shaykh Saduk (died 381 A.H.).

Following Seyyid Morteza, a famous and important figure in the study of Principles who wrote a book and whose views were for three or four centuries outstandingly influential was the great Shaykh Tusi (died 460 A.H.) who had been the pupil of Seyyid Morteza and who, almost a thousand years ago, founded the scholastic centre of Najaf in Iraq, which is still functioning today.

A later personality of the study of Principles was the late Waheed Bahbahani (1118-1208 A.H.), who in various ways was a very important figure. Many of his pupils in jurisprudence and *ijtihad* were brought by him to a high level of distinction and excellence. Another was his thorough combat against the previously mentioned *akhbar*iyyin who at that time were accumulating an extraordinary influence. The success of the system of *ijtihad* over the corrupt system of the *akhbariyyin* owes much to his efforts.

Over the past hundred years, without doubt the most important figure in the study of Principles is the late Shaykh Morteza Ansari (1214-1281 A.H.), and those who have come after him have all followed his school of thought. Until now no line of thought has been formed that has transformed that of Shaykh Ansari, although many students of his school have formed views, based on Shaykh Ansari's own teachings, that have occasionally abrogated a view of Shaykh Ansari. His two books, *Faraid ul-usul* and *Mukassib* (on the subject of jurisprudence) are today both used as textbooks for the students of religion.

Amongst the pupils of the school of Shaykh Ansari the most famous is the late Mulla Khorasani, who has been recorded in the history books as the man who issued the verdict (*fatwa*), for the constitutional movement in Iran, and who had a major share in the establishment of the constitutional regime.

Amongst the Islamic studies there is none so changeable and variable as the study of Principles and even today there exist outstanding figures who are counted as having their own (legitimate) views in Principles.

The Principles of Jurisprudence, bearing in mind that its concern is the calculation of knowledge and the mind, and has many minute investigations, is a pleasant and heart-warming study that magnetises the mind of a seeker of knowledge. As far as being an exercise in thought and in exact practices of the mind, it stands alongside logic and philosophy. The students of the ancient sciences owe their precise way of thinking largely to the study of Principles.

Lesson Four: The Subjects of the Principles

So as to acquaint the respected reader with the issues of the Principles of Jurisprudence we will discuss the main outline, not in the order followed by the scholars of the Principles, but in an order which will better suit our purposes. Previously, we stated that the study of Principles is a study of instructions, meaning that it teaches us the way of correctly and validly deducing the commandments of religion from the original sources. Following upon this, the issues of the Principles are all related to the four types of sources, which we spoke about in the second lesson. Thus the issues of the Principles are related either to "the Book", i.e. the Quran, or to the Sunnah (or to both, since both are originally verbal sources) or to consensus or to reason.

Now I wish to say that it is possible for us occasionally to meet circumstances in which we cannot deduce the necessary Islamic law from the four sources. In such circumstances the Islamic Shari'ah is not silent and has established for us a system of rules and practices from which we can interpret the apparent law.

Acquiring the apparent duty of application (from the requisite rules) after having failed to deduce the actual duty requires that we learn the correct method and instructions of benefiting from those rules.

Thus the study of the Principles, which is a study of instructions, becomes divided in two parts. One part contains instructions for correct and valid deducing of the actual laws of the Shari'ah from the relevant sources. The other part is related to the correct and valid way of benefiting from a chain of rules for application after having lost hope of deducing. The first part is called the principles for deducing (*usul ul-estanbatiyah*), and the second part is called the principles for application (*usulal-'amaliyah*) (of the special rules when there is no hope of deducing).

Furthermore, since the principles of deducing relate to deducing either from the Book, from the Sunnah, from consensus or from reasoning, the issues of the principles of deducing are divided into four parts. We will begin our discussion with the Book.

The Binding Testimony of the Quran's Apparent and Accepted Realities (*zawahir*)
In the Principles of Jurisprudence there are not many discussion particular to the Quran. The discussions relative to the Quran are basically related both to the Book and to the Sunnah. The only discussion centered solely on the Quran concerns the binding testimony of its apparent realities, by which is meant the question of whether the apparent laws of the Quran -regardless of whether or not they are qualified, conditioned and explained by existent or authentic traditions-are binding testimonies for the jurisprudents to unconditionally rely on.

It seems to be surprising that the *usulin*, those learned in the Principles, should have thought up such a debate. Could the legitimacy of a jurisprudent, relying on the apparent laws of the ayahs or verses of the sacred Quran be ever subject to doubt?

This is a discussion that was introduced by the Shi'ite 'ulema of the Principles in order to negate the misgivings of the *akhbariyyin*, who, as has been shown, believed that other than the holy ones (The Prophet, his daughter and the twelve Imams, peace be

upon them all) no one has the right to refer to the Quran, or to deduce the Shari'ah from it. Or, in other words, the eternal benefiting of Muslims from the Quran must be indirect, must be via the Sunnah of the Ahle Bait, the Prophet and the purified members of his House. This claim of the *akbariyyin* was based upon the Traditions that have forbidden interpreting the Quran by view.

The *'usuliyyin*, however, have proved that the deducing of Muslims from the Quran is direct, and that the meaning of the prohibition of 'interpreting the Quran by view' is not that people have no right to understand the Quran by their own thought and reflection, but that the Quran must not be interpreted according to desire and inflated ego.

Furthermore, the Holy Prophet and the Imams have authentically reported to have told us that forged Traditions would appear, and in order to distinguish the true from the false, we must compare all Traditions with the Quran, and any Traditions that disagree with the Quran must be realised to be false and thus be disregarded, meaning that they are not worthy of any respect. This of course cannot be done without referring to the Quran. What is more, the same Traditions make it clear that, in complete contrast to the claims of the *akhbariyyin*, the Sunnah is not the criteria of the Quran, rather the Quran is the criteria of the Sunnah.

The Apparent and Accepted Realities (*zawahir*) **of the Sunnah**
About the binding testimony of the Sunnah, by which is meant the Traditions and narrations that have reiterated the words, actions and silent assertions of the Prophet and the Imams, two important subjects are discussed in the study of Principles.

One is the question of the binding testimony of the *khabar al-wahid*, the Single Report, and the other is the question of the Traditions which are opposed to the Quran, and which, as we have seen, are to be rejected. Thus it is in this way that two important branches of the study of Principles is opened, one called the Single Report, (*khabar al-wahid*) and the other Unification and Preference (*t'adul wa tarajih*).

The Single Report (*khabar al-wahid*)
The Single Report is a Tradition that has been reported from the Imam or Prophet but by only one person, or is reported by more than one person but does not reach the level of being consecutively related by so many different people that there is no possibility of the Tradition being in any way wrong (*tawatur*). Now, can such a Tradition be used as a basis for deducing the Shari'ah or not?

The *'usuliyyin* believe that, provided the Transmitters of the Single Report from the first to the last were all just or at least were probably truthful, the Traditions they have narrated can be used to deduce the relevant law. One of the justifications for this claim is the holy ayah of the Quran, in which we are told, "*If there comes to you a wicked man with news; examine.*" (49:6), which means that if a wrong-doer comes and gives us some news, we are to research into his report, and without having definitely established the validity of the report, we are in no way to put it into effect. Similarly, the ayah tacitly indicates that if a just person and reliable person gives us a report, we are to put it into effect. The tacit meaning of this ayah, therefore, is proof of the binding testimony of the Single Report. [5]

Unification and Preference
Now the issue of opposing Traditions. Often it occurs that various Traditions on the same subject are opposed to each other. For example, about whether we should recite the *thikr* (remembrance) of the third and fourth units of prayer (*rak'ats*) - called the *tasbihat al-arb'ah* - three times in each unit or whether only one time is enough, from some Traditions it is learned that it must be said three times, while in one Tradition we learn that one time is enough. Or about whether it is permissible to sell human manure, there are likewise various Traditions that oppose each other.

What must be done when we have such varying Traditions? Must we consider that when two contrasting reports exist we are to ignore them both, just as if we had no Traditions on that subject at all? Or do we have the option of acting according to whichever of them we like? Or are we to act according to precaution and thus to the Tradition that is nearer to precaution (which, pursuing our previous example of the *thikr* of the third and fourth units of the prayer, would mean acting according to the Traditions that tell us to recite it three times, and in the example of the issue of selling human manure, to the Traditions that tell us it is forbidden)? Or is there another way of acting?

The 'ulema of the Principles have determined that firstly the unified content of all the varying Traditions must as far as possible be implemented, and, if this is not possible, and neither of the two sides has preference over the other in some way, such as in the reliability of the chain of narrators, in its credibility amongst earlier 'ulema who may have had some other testimony that we have missed, or in its being clearly not due to *taqiyah*, [6] and such like, we have the option to act according to whichever of them we like. [7]

There are Traditions themselves that contain the instructions of what, in the case of contradicting Traditions, we are to do. The Traditions that lead us to the resolving of the difficulty of contradicting Traditions are called Corrective Reports (*akhbar ul-'elajiyah*).

The 'ulema of the Principles, on the basis of these Corrective Reports, have expressed their views on the contradicting Traditions. This is the branch of the study of Principles that has been named "unification and preference" and which discusses the unification of opposing Traditions, and the superiority of some over others.

From what has been said it is clear that the issue of the binding authority of apparent laws is relevant to the Book and the issues of the Single Report and of the contradicting testimonies concern the Sunnah. Now it is to be said that there are issues in the Principles that are common both to the Book and to the Sunnah and these we will talk about in the next lesson.

Lesson Five: Issues Common to the Book and the Sunnah

In the previous lesson we showed some of the issues of the Principles that were particular either to the Book or to the Sunnah, and at the conclusion of the lesson it was said that some issues of the Principles are related both to the Book and to the Sunnah. In this lesson we will pay attention to these common discussions.

The common discussions consist of the following:
The discussion of imperatives (*awamir*)
The discussion of negative imperatives (*nawahi*)
The discussion of generalities and particularities (*aam wa khas*)
The discussion of unconditional (*mutlaq*) and conditional (*muqayyad*)
The discussion of tacit meanings (*mafahim*)
The discussion of the abstract (*mujmal*) and the clear (*mubayyan*)
The discussion of the abrogator (*nasekh*) and the abrogated (*mansukh*)

Now, within the limits of merely becoming acquainted with these terms, each one will be separately discussed.

The Discussion of Imperatives (*awamir*)
The Arabic *awamir* is the plural of the word *amr* which means command. It also means the type of verb form that in English is called imperative, such as the verb form: Listen! or Stand!

In the Book and the Sunnah, many of the phrases are in the form of the imperative, and it is here that many questions are raised in jurisprudence that must be answered in the study of Principles. Such questions as to whether or not the imperative is a proof of its being obligatory (*wajib*) or of being desirable, or of neither. Does the imperative signify that the verb is to be done once or a number of times?

For example, the Quran contains the following instruction, "*Take from their property charity, you cleanse them and purify them thereby, and pray for them; your prayer is a soother for them*" (9:103) "Pray", in this holy verse, means supplicate, or send a blessing. Here, the first question that is raised concerns the status of the imperative verb form, "pray". Does it mean that to supplicate for them or send a blessing upon them is obligatory? In other words, is the imperative here an indication of obligation or not?

The second question is as to whether or not the imperative is an indication of immediate obligation? Is it obligatory that right after taking the divine tax (*zakat*) prayer is to be offered for them, or is an interval no problem? Thirdly, is one prayer enough or must it be performed repeatedly?

In the study of Principles, these matters are all discussed in depth, but here is not the place to discuss them further. Those who choose to study Jurisprudence and the Principles will naturally learn about these details.

The Discussion of Negative Imperatives (*naw ahi*)
The Arabic word *nawahi* is the plural of *nahy* which means to stop or prevent, and is the opposite of *amr*, the imperative. If in English we say, "Do not drink alcohol," this is a negative imperative in English and in Arabic a *nahy*. Both in the Book and in the Sunnah there are many phrases which are negative imperatives.

Similar questions arise on this subject to those we saw on the subject of the imperative. Is the negative imperative testimony for the object of the verb being forbidden (*haram*) or for it being undesirable (*makruh*) but not forbidden (*haram*)? Likewise, does the negative imperative testify permanency, i.e. that the action of the

verb must never be done, or that it is only to be refrained from during a temporary period?

These are questions the answers to which are provided by the study of Principles.

Discussion of Generalities and Particularities (*aam wa khas*)
In the civil and penal laws of human society, we notice that a general and common law exists which applies to all, and we then notice that there also exists another law related to a group of individuals from that society; a law that is opposed to the common and general law.

In such instances, what is to be done? Must the two laws be received as being self-contradicting? Or, since one of the two laws, compared to the other, is general while the other is particular, is the particular law to be received as an exception to the general law?

For example, we are told in the Quran that divorced women must wait after their divorce for three monthly periods, and after that term they are free to remarry. In reliable Traditions, however, we are told that if a woman is married by a man, and before marital relations (i.e. sexual intercourse) occurs between them, the woman is divorced, it is not necessary for the woman to observe the term.

What are we to do here? Are we to consider this Tradition to be opposed to the Quran and therefore reject it and disregard it just as we have been instructed? Or are we to consider that, on the contrary, this Tradition, in reality, expounds the Quranic ayah for us, that it has the rank of an exception in certain of the particular circumstances, and that the Quran is in no way contradicted by it.

It is the second view that is the correct and valid one of course, for man is used to having a law introduced in the general form and then having the exceptions explained. Man is not used to having the exceptions explained before the law is introduced, and the Quran has addressed human beings on the basis of the terms and language of mankind. In another place the Quran itself has counted the Traditions of the Prophet as being reliable. "*What the Prophet gives you, take! And what he has prohibited you, avoid!*" (59:8). In these types of circumstances, we receive particularities as having the rank of exceptions to generalities.

Unconditional (*mutlaq*) **and Conditional** (*muqayyad*)
The question of conditional and unconditional is similar to the question of generality and particularity, but generality and particularity are relevant to what the law applies to, while conditional and unconditional are relevant to the different circumstances and qualities of the law itself. The general and particular are relevant to an order that generally covers all the different forms of that which the law applies to, some of which, due to a particular reason, are exempt from that generality. The question of unconditional and conditional, however, is related to the essence and nature pertaining to the duty which the duty-bound must perform. If that essence and nature pertaining to the duty has no particular condition then it is unconditional, and if it has a particular condition, it is conditional.

For example, in the example which we previously quoted, the Holy Prophet was commanded that at the time of taking the *zakat* from the Muslims he was to supplicate for them. This instruction, as regard whether the Prophet was to supplicate for them loudly or quietly, for example, or whether he was to supplicate for them in company or when alone, is unconditional.

Now I wish to say that if we have no other proof or reason provided by the Quran or reliable Traditions making one of the two above-mentioned conditions, we act according to the unconditional meaning of the ayah. That is, we are free to perform the command in whatever fashion we like. If, however, we are provided with an authentic proof telling us, for example, that the supplication is to be unconditional to the conditional, which means that we are to consider the unconditional sentence to be given a condition by the conditional sentence, and we then interpret the unconditional as the conditional.

The Discussion of the Tacit (*mafahim*)
The tacit in the terminology of the study of Principles is the opposite of spoken. Imagine that someone says, "Come with me to my house and I will give you such and such a book." This sentence, in reality, is a sentence taking the place of the following two sentences: First, "If you come with me to my house I will give you that book", and second, "If you do not come with me to my house I will not give you that book". So here there are two connections: the affirmative and the negative. The affirmative connection is between accompanying and giving, and exists in the substance of the sentence and it is uttered. For this reason it is called the spoken. The negative connection on the other hand is not uttered, but from the sentence it is naturally understood. This is why it is called tacit or, more literally, the understood.

In the discussion on the Single Report we saw how the *'usuliyyin* have realised the binding testimony of the Single Report, when the narrators are all just from the holy ayah of the Quran which tells us, "If there comes to you a wicked man with news, examine."

This realisation is from the tacit meaning of the ayah. The words of the ayah only tells us that we are not to put into effect the news of the unjust without investigation, while the tacit meaning of the ayah is that we are not to put into effect the news he gives us, but we are to put into effect the news given to us by someone who is just.

The Abstract (*mujmal*) **and the Clear** (*mubayyan*)
The discussion of the abstract and the clear does not have so much importance. It simply means that sometimes a phrase in the language of the Holy Prophet is ambiguous for us and its meaning unclear, like the word *ghena* (music), while in another proof from the Quran or the Sunnah there exists its explanation. In such cases the ambiguity of the abstract is cancelled by the clear.

The Abrogator (*nasekh*) **and the Abrogated** (*mansukh*)
Sometimes in the Quran and the Sunnah we come across an instruction that was temporary, meaning that after a time a different instruction was given, which has, to use a phrase, cancelled the first instruction.

For example, the Holy Quran first tells us that if women having husbands commit adultery they are to be confined to their houses until they die or until God established some other way for them. Then the way that God established for them was the general instruction that if a man having a wife or a woman having a husband commits adultery, they are to be executed.

Or, for example, at first the instruction was revealed that in the holy month of Ramazan, even at night, men must not have intercourse with their wives. This rule was then cancelled and permission was given.

It is essential for a jurisprudent to distinguish the abrogator and the abrogated. On the issue of abrogation many questions are raised which are reflected on and discussed in the study of Principles.

Lesson Six: Consensus and Reasoning

Consensus

As we saw in the second lesson, one of the primal sources of jurisprudence is consensus. In the study of Principles, the questions of the binding testimony of consensus, the proofs of it being a binding testimony, and the pursuing of the method by which proofs are benefited from it, are all subjects of debate.

One of the topical points related to consensus is as to the nature of the proof's being binding. The 'ulema of our Sunni brothers claim that the Holy Prophet has told us, "My nation will not (all) consent to a mistake". Basing their view on this, they say that if the Muslim nation finds the same point of view on an issue, that view is clearly the correct one.

According to this Tradition, the members of the Muslim nation are ruled in total as having the same status as a Prophet and being faultlessly free from error. The speech of the whole nation has the same rank as the speech of a Prophet, and all the nation, at the moment of finding the same view, are faultless, i.e. immaculate.

According to this view of the Sunni 'ulema, since the whole nation is infallible, whenever such an agreed view occurs, it is as if divine inspiration has been revealed to the Holy Prophet.

Shi'ites, however, in the first place, do not count such a Tradition as being definately from the Prophet. Secondly, they agree that it is impossible for all the members of the whole nation to stray and to err, but the reason for this is that the leader of that nation, the Prophet or Imam, is a person who is infallible and immaculate. That the whole Muslim nation cannot err is because one particular member of the Muslim nation cannot err, not because from a group of people who are fallible, an infallible is formed. Thirdly, that which is called consensus in the books of jurisprudence and theology (*kalam*) is not the consensus of the whole nation. It is simply the consensus of a group, the group of managers or supervisors-i.e. the 'ulema- of the nation. Furthermore, it is not even the consensus of all the 'ulema of the nation, but the consensus of the 'ulema from one sect from amongst the nation.

Here is where the Shi'ites do not maintain the same principle of consensus that the Sunni 'ulema maintain. Shi'ites maintain the binding testimony of consensus only in as far as it is the means of discovering the Sunnah.

In the thinking of the Shi'ites, whenever there is no proof in the Book and the Sunnah about a certain subject, suppose, but it is known that the general body of the Muslims, or a numerous group of the companions of the Prophet, or those companions of an Imam who did nothing except in accordance to the divine instructions, all used to act in a particular way, then we realise that in those times there existed an instruction of the Sunnah which we are unaware of.

Acquired Consensus and Narrated Consensus
Consensus, whether that which our Sunni brothers have accepted or that which Shi'ites consider valid, is of two types: acquired and narrated. Acquired consensus means the consensus, the knowledge of which the mujtahid has himself directly acquired as the result of minute research into history and the views and opinions of the companions of God's Prophet or of the companions of the Imams, or of the people close to the time of the Imams. [8]

Narrated consensus is the consensus about which the *mujtahid* has no direct information, but which has been related by others. Acquired consensus, of course, is a binding testimony, but narrated consensus, if certitude is not obtained from the narrator by which it is narrated, is not relied upon. Therefore, the Single Report of consensus does not constitute a binding testimony, even though, as we have seen, the narrated Single Report of the Sunnah does, provided the chain of narrators meets the conditions.

Reasoning
Reasoning is one of the four sources of jurisprudence. What is meant is that sometimes we discover a law of the Shari'ah by the proof of reason. That is by means of the deduction and logic of reason we discover that in a certain instance a certain necessary law or prohibitive law exists, or we discover what type of law it is and what type it is not.

The binding testimony of reason is proved by the law of reason ("the sun is shining, hence the proof of the sun" - meaning that with the existence of reason no other proof is needed), and also by the confirmation of the Shari'ah. Essentially we are sure of the Shari'ah, and of the principle of beliefs of religion, by means of reason. How could it be that in the view of the Shari'ah reason is not to be considered as binding?!
The issues of the Principles related to reason are in two parts. One part relates to the inner meaning or philosophy of the commandments. The other part is related to the requirements of the commands.

Let us begin with the first part. One of the obvious elements of Islam, especially in the view of the Shi'ites, is that the Shari'ah of Islam exists in accordance to what comprises the best interests of human beings and their worst interests. That is, each command (*amr*) of the Shari'ah is due to the necessity of meeting the best interests of human beings and each prohibition (*nahy*) of the Shari'ah arises from the necessity of abstaining from their worst interests, i.e. the things that corrupt them.

Almighty God, in order to inform them as to what comprises their best interests, in which lies their happiness and prosperity, has made a chain of commands obligatory (*wajib*) or desirable (*mutahab*) for them. And so as to keep human beings away from all that which corrupts them, He prohibits them from those things. If the best interests and forms of corruption did not exist, neither command nor prohibition would exist. If the reasoning of human beings became aware of those best interests and those forms of corruption, they are such that it would devise the same laws that have been introduced in the Shari'ah.

This is why the practioners of the Principles, and also the *mutakalimin*, consider that, because the laws of the Shari'ah accord to and are centred on the wisdom of what is best and worst for human beings-and it makes no difference whether those best and worst interests are relevant to the body or the soul, to the individual or the society, to the temporary life or the eternal -wherever laws of reason exist, so the corresponding laws of the Shari'ah also exist, and wherever there exists no law of reason, there exists no law of the Shari'ah.

Thus, if we suppose that in some case no law of the Shari'ah has been communicated to us, particularly by means of narration, but reasoning absolutely traces with certitude the particular wisdom of the other judgments of the Shari'ah, then it automatically discovers the law of the Shari'ah in this case too. In such instance reasoning forms a chain of logic: First, in such and such a case, there exists such and such a best interest which must necessarily be met. Second, wherever there exists a best interest that must necessarily be met, the Legislator of Islam is definitely not indifferent, rather He commands the meeting of that best interest. Third, so, in the quoted instances, the law of the Shari'ah is that the best interests be met.

For example, in the time and place of the Holy Prophet there was no opium or addiction to opium, and we, in the narrated testimonies of the Quran and the Sunnah and consensus, have no testimonies particular to opium one way or the other, yet due to the obvious proofs of experiencing opium addiction, its corruption has been experienced. Thus, with our reasoning and knowledge, and on the basis of "a form of corruption which is essentially to be avoided", and because we know that a thing which is harmful for human beings and a corruption of them is forbidden in the view of the Shari'ah, we have realised that the law about opium is that addiction to opium is forbidden.

Similarly, if it becomes established that smoking tobacco definitely causes cancer, a *mujtahid*, according to the judgment of reasoning will establish the law that smoking is forbidden according to the Divine Law.

The *'usuliyyin* and the *mutakalimin* call reason and the Shari'ah inseparable from each other. They say that whatever law is established by reason is also established by the Shari'ah.

However, this of course is provided that reasoning traces in an absolute, certain and doubtless way those best interests which must be attended to and those worst interests or forms of corruption that must be shunned. If not, the name reasoning cannot be given to the use of opinion, guesswork and conjecture. Analogy for this very factor is void for it is more opinion and imagination rather than reasoning and certitude.

On the other hand, when reasoning plays no part in the forming of a law and we only see that such and such a law has been introduced in the Shari'ah, we know that our best interests were definitely involved, for otherwise the law would not have been made. Therefore, reason, in the same way as it realises the law of the Shari'ah by realising the best interests of human beings, similarly realises the best interests of human beings by realising the law of the Shari‘ah.

Therefore, in the same way it is said that whatever is a law of reason is a law of the Shari'ah, it also said that whatever is a law of the Shari'ah is a law of reason.

Let us now discuss the second part, the requirements of the commands. We know that whatever law made by whatever sane law-maker possessing intellect naturally has a chain of essentials that must be judged according to reason to see if, for example, that particular law necessitates a certain other law, or if it necessitates the negation of a certain other law.

For example, if a command is made, such as the *hajj* and the form of worship to be performed there- and the *hajj* necessitates a chain of preparations, amongst them acquiring a passport, buying a ticket, vaccinations, and currency changing; does the law of the *hajj* being obligatory require these preparations to be obligatory as well, or does it not?

The same question can apply to the things that are forbidden. Does the rule of a thing being forbidden demand that its preparations also be forbidden?

Another issue. At one time a person is not able to do two things that are obligatory for him to do because they must be done separately. Like at the same time it is obligatory to pray one's obligatory ritual prayers, it is also obligatory, assuming it has become unclean by blood, urine, etc., to clean the mosque. So the performing of one of these two duties demands the neglect of the other. Now, does one command necessitate and contain the prohibition of the other? Do both the commands include this prohibition?

If two things are obligatory for us while it is not possible for us to perform both of them at once, so that we have no option but to choose only one of them, then if one of the two is more important, we must definitely perform that one.

Which brings us to another issue. Is our duty in regards to the important altogether lapsed by our duty in regards to the more important or not? For example, two men are in danger of their lives and it is only within our means to save one of them, and one of them is a good Muslim who works for others while the other is a corrupt man who only troubles others, but whose life, all the same, is still sacred.

Naturally, we must save the Muslim who is good and who helps others whose life is more valuable to society than the life of the other. That is, to save him is more important while to save the life of the other is important.

In the above mentioned examples, it is reasoning with its precise calculations which clarifies our specific duties, and in the study of Principles these issues and issues like these are all discussed and the way of properly determining the answers is learned.

From what has been stated from the fourth lesson to here it has become clear that the issues of Principle are all divided into two parts, the "Principles of Deducing" and the "Principles of Application". Likewise, the Principles of Deducing-are in turn divided into two parts; the Narrated and the Reasoned. The Narrated are relevant to all the discussions focused on the Book, the Sunnah, and consensus, while the Reasoned part is related to reason.

Lesson Seven: The 'Principles of Application'
We have learned that the jurisprudents refer to four sources for his deducing of the laws of the Shari'ah. Sometimes in his referrals the jurisprudent is successful and sometimes he is not. That is, sometimes (of course predominately) he attains the actual law of the Shari'ah in the form of certitude or a reliable probability, which means a probability that has been divinely endorsed. In such cases, the duty becomes clear and he realises with certitude or with a strong and permissible probability what it is the Shari'ah of Islam demands. Occasionally, however, he is unable to discover the duty and the Divine Law from the four sources, and he remains without a defined duty and in doubt.

In these cases what must be done? Has the Legislator of Islam or reason or both specified a certain duty in the case of the actual duty being out of reach? And if so, what is it?

The answer is that yes, such a duty has been specified. A system of rules and regulations has been specified for these types of circumstances. Reason too, in certain circumstances, confirms the law of the Shari'ah, for the independent law of (aware) reasoning is the very same as the law of Shari'ah, and in certain other instances it is at least silent, meaning that it has no independent law of its own and accords to the Shari'ah.

In the part of Principles which contains the Principles of Deducing we learn the correct and valid method of deducing the Shari'ah, and, in the part concerning the Principles of Application, we learn the correct way of benefiting from the rules that have been introduced for the kind of situation mentioned above, and of putting them into practice.

The general principles of application that are used in all the sections of Jurisprudence are four:
The Principles of Exemption (*bara'at*)
The Principle of Precaution (*ihtiyat*)
The Principle of Option (*takhyyir*)
The Principle of Mastery (*istishab*)

Each of these four types of principles have a special circumstance which it is necessary for us to acquaint ourselves with. Firstly we will define the four principles themselves.

The Principle of Exemption means that we are released from our obligation and we have no duty. The Principle of Precaution is the principle that we must act according to precaution, which means that we must act in such a way that if z duty actually exists as a law, we have performed that duty. The Principle of Option is that we have

the option to choose one of two things, whichever we like, and the Principle of Mastery is the principle that that which existed remains in its original state - or masters the doubt that opposes it - while the doubt is ignored.

Now we will see in what circumstances the Principle of Exemption applies and in what circumstances the Principles of Precaution, Option and Mastery apply. Each of these has its particular instance and the study of Principles teaches us these instances. Sometimes the jurisprudent remains unable to deduce the law of the Shari'ah and is unable to trace a particular necessity and remains in a state of doubt, and it might be that the doubt is linked to some general or broad knowledge like, for example, it is doubted whether, in this era of the physical absence of the Imam, the special congregational prayer is obligatory on Fridays or the normal noon prayer-here the obligation of both the Friday prayer and the noon prayer is in doubt, while we have the general information that one of the two is definitely obligatory - or it might be the doubt is not linked to some general knowledge, like a doubt as to whether, in the era of our Imam's absence, the prayer of *id-i-fitr* in congregation is obligatory. In this second case our doubt is a "primary doubt" (*shak badwi*) and not a doubt bordering on something that is known.

So the doubts of the jurisprudents about an obligation are either linked to some general knowledge or are primary doubts. If they are linked to some general knowledge, it is either possible to act in accordance to precaution, meaning that it is possible for both possible duties to be performed, or it is not possible to act in precaution. If precaution is possible, it must be acted in accordance with, and both of the possible duties must be performed, and such an instance calls for the Principle of Precaution. Sometimes, however, precaution is not possible, because the doubt is between obligatory and forbidden. We doubt, for example, in this period of the Imam's absence, whether the performance of certain duties are particular to the Imam and forbidden for us or whether they are not particular to the Imam and are obligatory for us. Here it is self-evident that in such instances the way of precaution is closed, so here is an instance that calls for the Principle of Option, and we must do which ever of them we choose.

Assuming, however, that our doubt is a primary doubt not linked to any general knowledge, the instance is either that we know the previous condition and the doubt is as to whether the previous law stands or is changed, or the instance is that the previous condition not been established either. If the previous condition is established the situation calls for the Principle of Mastery (mastery of the known previous condition over the doubt), and if the previous condition is not established the situation calls for the Principle of Exemption.

A mujtahid must, as the effect of frequent application, have great power of discernment in the execution of these four types of principles; discernment that sometimes is in need of hair-splitting exactitude, and if not he will encounter mistakes. [9]

Of these four principles, the Principle of Mastery has been uniquely established by the Shari'ah, to which reason accords having no independent rule of its own, but the other three principles of Principles of Reason that the Shari'ah has confirmed.

The justification of the Principle of Mastery consists of a number of reliable traditions which are in this form: "Do not reverse a certitude by a doubt", i.e. we are not to reverse or reject our certitude for the sake of a doubt. From the content of these Traditions and what precedes and follows this sentence it becomes clearly discerned that what is meant is exactly that which the jurisprudent calls Mastery.
On the subject of the Principle of Exemption likewise there exist many Traditions of which the most famous is the hadith *ur-raf'i*.

The hadith *ur-raf'i* is from the Holy Prophet, who told us: "Nine things have been taken from my nation: what they do not know, what they have not tolerated, what they have been compelled to, what they have found themselves in need of, mistakes, forgetfulness, misfortune, envy (which they have not acted on) and whisperings of doubt in the thoughts of the creation."

The *'usulin* have had numerous discussion about this Tradition and about each of its points, and of course the part that sanctions the Principle of Exemption is the first line wherein we are told that whatever we do not know and has not reached us has been taken from us, and thus the obligation is lifted from us.

These four principles are not particular to *mujtahid*s for understanding the laws of the Shari'ah. They are also relevant to other subjects. People who are not *mujtahid*s and who must therefore imitate (taqlid) a *mujtahid* can also benefit from them at the time of certain doubts.

For example, imagine that an unweaned baby boy takes milk from a woman other than his mother, and when that boy grows up, he wants to marry the daughter of that woman, and it is not known whether as a baby he drank so much milk from that woman's breast that he is to be counted as the "wet-nurse son" of that woman and her husband or not. That is, we doubt whether the boy drank milk from her breast fifteen consecutive times, or for a complete day and night, or so much that his bones grew from her milk (in which cases the boy becomes counted as her son and thus similar to the daughter's brother are forbidden for her). This instance calls for the Principle of Mastery, because before the boy drank the woman's milk he was not her "wet-nurse son", and now we doubt whether or not he is. By the Principle of Mastery, we conclude that there is no question of a wet-nurse relationship.

Similarly, if we had performed minor ablution obligatory for the ritual prayer or to touch the Quran or the holy names and for certain other things, and we doze and then we doubt whether or not we actually fell asleep (in which case the ablution becomes void), by the Principle of Mastery, we conclude the validity of the ablution. In the same way, if our hand was clean and we then doubt as to whether it is still clean or has become *najas* (unclean), by the Principle of Mastery, we conclude it to be clean. If, however, it was *najas* and we doubt whether we have cleaned it or not, by the Principle of Mastery, we conclude that it is still unclean.

Likewise, if a liquid is in front of us and we doubt whether or not it contains alcohol, like some medicines, the situation calls for the Principle of Exemption, and there is no obstacle to the use of that liquid. If, however, we have two glasses of medicine and we know that alcohol exists in one of them, meaning that we have some general knowledge about the existence of alcohol in one of them, here the Principle of

Precaution is called for, and we must not drink either.

Imagine that we are at the side of a road in the middle of a desert and to stay there or to travel in one of the two directions of the road definitely involves the risk of our lives, while to travel in the other direction means we will find safety; but we do not know in which direction lies our safety and in which direction lies the risk of our lives. Here we are faced with two laws. The one is the obligation to save our lives and the other is the prohibition against risking it. In which direction must we travel? This situation calls for the Principle of Option, and we must travel in which ever direction we like, and, if we choose the wrong direction, we are blameless.

Notes:

1- These treatise (*risalehah*) works are wherein the mujtahid states his verdicts on all or almost all the things that can affect daily life.

2- The weakness of this view is understood when it is realised that many of the Traditions recorded in the reliable books, i.e. books compiled by reliable men, are opposed to each other, which naturally indicates that the only logical way of discerning the actual holy words from the false is by examining the chain of narrators. It is also to be borne in mind that for a number of reasons, such as lack of time for research or of knowledge of Transmitters etc., it may not have been possible for the reliable compilers themselves to make the necessary distinctions. Translator's Note.

3- Consensus is further discussed in the sixth lesson.

4- His book is called *Ta'sis ash-shi'ah ulum al-islam*.

5- This ayah and such "tacit meanings" (*mafahim*) are further discussed in the next lesson.

6- *taqiyah* is the legitimate practice of concealing one's faith in times of danger-sometimes by means of adopting the practices of a different faith-which was often necessary during the times of the Imams.

7- In the final lesson, the Principles of Jurisprudence, more light is thrown on this subject.

8- Of course the Shi'ite view is that the time of the Imam will last as long as mankind itself; what is referred to here is the era of access to the Imams. Translator's Note.

9- Of course if he was likely to make many mistakes he would not yet be regarded as a *mujtahid* at all. Translator's Note.

Part II

Jurisprudence (*fiqh*)

Lesson One: Introduction

The study of jurisprudence is one of the most extensive studies in Islam. Its history is older than all the other Islamic studies. It has been studied on a very wide scale throughout the whole of that time. So many jurisprudents have appeared in Islam that their numbers cannot be counted.

The Word Jurisprudence (*fiqh*) **in the Quran and the Traditions**
The words *fiqh* and *tafaqquh*, both meaning "profound understanding", have been often used in the Quran and in the Traditions. In the Holy Quran we have been told: "*Why should not a company from every group of them go forth to gain profound understanding (**tafaqquh**) in religion and to warn their people when they return to them, so that they may beware.* " (9:122)

In the Traditions, the Holy Prophet has told us: "Whoever from my nation learns forty Traditions; God will raise him as a *faqih* (jurisprudent) an *alim* (a man of '*ilm* or knowledge)."

We do not know for sure if the 'ulema and fuzala, the learned and distinguished, of the Prophet's companions were called *fuqaha* (jurisprudents), but it is certain that this name was applied to a group since the time of those who had not witnessed the Prophet but had witnessed those who had (*tabi'in*).

Seven of the tabi'in were called 'the seven jurisprudents'. The year 94 A.H. which was the year of the departure from this world of Imam Ali ibn Husein (d,) and the year in which Sa'id ibn Masib and Orwat ibn Zubayr of the "seven jurisprudents" and Sa'id ibn Jabir and others of the jurisprudents of Medina also passed away, was called the 'year of the jurisprudents'. Thereafter the word *fuqaha* was gradually given to those with knowledge of Islam, especially of the laws of Islam.

The holy Imams have repeatedly made use of these words. They have commanded some of their companions to profound understanding (*taffaqquh*) or have termed them as a master of jurisprudence or fuqaha (the plural of *faqih*, a jurisprudent). The prominent pupils of the Imams during that same period were known as Shi'ite fuqaha.

The word jurisprudence (*fiqh*) **in the terminology of the 'ulema**
In the terminology of the Quran and the Sunnah, *fiqh* is the extensive, profound knowledge of Islamic instructions and realities and has no special relevance to any particular division. In the terminology of the 'ulema, however, it gradually came to be especially applied to the profound understanding of the Islamic laws. The 'ulema of Islam have divided the Islamic teachings into three parts:

First, the realities and beliefs: the aim of which is awareness, faith and certitude, and which are related to the heart and the mind, containing issues like the issues related to the unseen past and the unseen future, to Prophethood, revelation, angels and

Imamate.

Second, morality and self-perfection: the goals of which are the spiritual qualities of how to be and how not to be, containing issues like cautiousness of God (*taqwa*), justice (*'idalat*), generosity, courage, fortitude and patience (*sabr*) being satisfied and content with God (*riza*) firmness on the true path (*istiqamat*) and so on.

Third, the laws and issues of actions: which is related to the special external actions that human beings must perform and how the actions they perform are to be and how they are not to be.

The jurisprudents of Islam have termed this last division, *fiqh* (jurisprudence), perhaps from the viewpoint that since the early days of Islam the laws were the most subject to attention and queries. Therefore, those whose speciality was in this subject came to be known as the fuqaha (jurisprudents).

Two Types of Law

It is necessary that we mention some of the special terms of the jurisprudents. Amongst these are the names of the two divisions the jurisprudents have made of the Divine Laws: the laws of (human) duty (*hukm taklifi*) and the laws of (human) situations (*hukm waz'i*).

The laws of duty include those duties which contain obligation, prohibition, desirability, undesirability, and, simple permissibility.

These five laws are termed as "the five laws" (*ahkam khamsah*).

The jurisprudents say that in the view of Islam no single action is empty of one of these five laws. Either it is obligatory (*wajib*), meaning that it must be done and must not be left undone, like the five daily ritual prayers, or it is forbidden (*haram*), meaning that it must not be performed and must be refrained from like lies, injustice, drinking alcohol and such like; or it is desirable (*mustahab*) meaning that it is good to do but leaving it undone is not a crime or sin, including such things as praying in a mosque; or it is undesirable (*makruh*), meaning that it is bad to do but if done no sin is committed, like talking about worldly affairs in a mosque which is a place of worship; or it is permissible (*mubah*), meaning that the doing of it and the not doing of it are exactly equal, and this includes most actions.

The laws regarding situation are not like the laws regarding duty. The laws regarding duty consist of "do's" and "don'ts", commands and prohibitions, or the giving of permissions, while the laws of situation regard situations like marriage and ownership and the rights thereof.

Types of Obligation

Another issue is that the obligations, the things that are obligatory, are divided into many different classifications. Firstly, they are divided into *ta'abbudi* and *tawassuli. Ta'abbodi* means those things, the correct and valid performance of which depends upon the intention (*niyyat*) of nearness of God. That is, if the obligatory action is performed solely with the intention of approaching the Divine without any worldly, material motive, it is correct and valid, and if not, it is not valid. Prayer and fasting are

both "*wajib ta'abbudi*"

Wajib tawassuli, however, is that in which, even if performed, imagine, without the intention of nearness to God, still the obligation has been met and one's duty fulfilled. Obeying one's parents, for example. Or the performance of responsibilities towards society, like if a person undertakes to do a certain work in return for a certain payment, the doing of that work. And, in fact, absolute loyalty to all one's promises is the same way.

Another way in which the obligations are divided is into '*aini* and *kafa'i*. An '*aini* obligation means that which is obligatory on each and every individual, like prayer and fasting, and *kafa'i* obligation is that which is obligatory on the general Muslim population, and which, when performed by one or a group of them, is no longer obligatory on any of them. Such types of obligation include the needs of the community like the need for doctors, soldiers, judges, farmers, traders and so on. In the same class is the burial procedures of deceased Muslims that the general Muslim population is commanded to perform, which, when performed by some, are no longer obligatory on any.

Another way the obligations are divided is into *t'ayini* and *takhiyiri*. A *t'ayini* obligation is that a special specified thing must be performed, like the daily prayers, fasting, *Hajj*, *khoms*, *zakat*, commanding to what is recognised as good (*amr bi m 'aruf)*, struggle (*jihad*), etc.

A *takhiyiri* obligation on the other hand, means that the duty-bound is to perform one thing out of two or several things. For example, if a person has intentionally not fasted one day during the holy month of *Ramazan*, it is a *takhiyiri* obligation for him either to free a slave, or to feed sixty poor people or to fast consecutively for two months. Yet another way the obligations are divided is into *nafsi* and *muqaddami*. A *nafsi* obligation means that the duty itself is the concern of the Shari'ah, and it is for its own sake that it is demanded, while a *muqaddami* obligation is obligatory for the sake of something else.

For example, to save a respected person's life is obligatory but this obligation is not a preparation for some other obligation. However, the actions needed in preparation for saving him, such as acquiring a rope or boat or other means of saving a person who, let us say, has fallen in a river and cannot swim, are also obligatory, not for their own sakes but as a preparation for a different obligation, the obligation of saving the man's life.

Or, for example, the actions of the *Hajj* are themselves obligatory, but the acquiring of a passport and ticket and the other preparations are obligatory in preparation. Prayer is a *nafsi* obligation, while to take *Wuzu* or *ghusl* or *tayammum* as their substitute in order to enter the state of cleanliness necessary for the prayer are not obligatory until the time of prayer has begun, and then not for themselves, but as an obligatory preparation for the obligatory prayer. Thus the *Hajj* and the ritual prayers are both *nafsi* obligations, while acquiring a passport or taking ablution are *muqaddami* obligations.

Lesson Two: Brief History of Jurisprudence and Jurisprudents (1)

As we mentioned in the previous lessons, one of the preparations for learning about any field of knowledge is to pay attention to the famous personalities of that field, the views and ideas of whom were important, and to its important books.

Jurisprudence, the jurisprudence in which books have been classified and compiled that are still studied today, has a history of eleven hundred years, meaning that for eleven centuries, without a break, centres for the studying of jurisprudence and the related studies have existed. Masters have trained students and those students in their turn have trained other students, and this has continued down the ages until today. Furthermore, this relationship between master and pupil has never been broken. Other fields, of course, like philosophy, logic, arithmetic and medicine have been studied for far longer, and books exist on. These subjects that are older than the books that exist on jurisprudence. Perhaps in none of these subjects, however, can the guarding of the same kind of ever-present relationship between master and pupil be shown that has existed in jurisprudence. Even if such constant relationships existed in other subjects, still they are particular to the fields of Islamic studies. Only in the Islamic world does the system of teaching and studying have a continuous uninterrupted history going back over a thousand years.

The Shi'ite Jurisprudents

We will begin the history of the Shi'ite jurisprudents from the period of the Imam's "minor occultation" (260-320 A.H.), and this we will do for two reasons:

First, the period previous to the "minor occultation" was the period of the presence of the holy Imams, and in the period of their presence, although there were jurisprudents and *mujtahid*s who were able to make their own verdicts, who had been encouraged by the Imams to do so, yet due to the presence of the Imams they were nevertheless outshone by the brilliance of the Imams. That is, the referral of problems to the verdicts of the jurisprudents is because of there being no access to the Imams. In the period of the Imams' presence, however, people tried as far as possible to refer to the original sources of the Imams. Similarly, even the jurisprudents, bearing in mind distances and other difficulties, used to place their own problems before the Imams whenever they could.

Second, in the formal, classified jurisprudence, we are limited to the period of the minor occultation, for none of the actual books in jurisprudence from that period has reached us, or, if any have, I have no information about it.

All the same, amongst the Shi'ites there were great jurisprudents during the days of the holy Imams, whose value can become apparent and determined by comparing them with the jurisprudents of their period from other sects. The Sunni, ibn Nadin writes in his book Fihrist about Husein ibn Sa'id Ahwazi and his brother, both notable Shi'ite jurisprudents, "They were the best of those of their time in knowledge of jurisprudence, effects (i.e. writings and compilations) and talents," and, about 'Ali ibn Ibrahim Qumi he writes, "Amongst the 'ulema and jurisprudents," and, about Muhammad ibn Hasan ibn Ahmad ibn Walid, "And he has amongst books the book *Jam'e fil-fiqh*".

Apparently these books were compiled of traditions on the varying subjects of jurisprudence that the compilers considered to be reliable, and to which they acted in accordance, together with the comments of the compilers.

The scholar Hilli, in the introduction to his book *M'utabar* wrote, "Bearing in mind that our jurisprudents (God be pleased with them) are many and their compilations numerous and to narrate the names of them all is not possible, I will content myself with those who are the most famous in merit, research and good selection, and with the books of those paragons whose *ijtihad* is mentioned in other undoubtable books as reliable.

"Those I will mention include, from the 'earlier' period (i.e. the period of access to the Imams), Hassan ibn Mahboub, Ahmad ibn Ali Nasr Bazanti, Husayn ibn Sa'id, Fadl ibn Shathan, Yunis ibn 'Abd ur-Rahman and, from the later period, Muhammad ibn Babawayh Qumi (Shaykh Saduq), and Muhammad ibn Y'aqub Kulayni and from the authors of verdicts (fatwas) Ali ibn Babawayh Qumi, ibn Jamid Iskafi, ibn Ali 'Agil, Shaykh Mufid, Syed Morteza.'Alam ul Huda and Shaykh Tusi . . . "

Notice that although the first group are quoted as having their own views and good selection and *ijtihad*, yet they are not mentioned as being masters of verdicts.

This was because their books, even though they were the summaries of their *ijtihad*, were in the form of collections of traditions and not in the form of verdicts.
Now we will look at the history of Shi'ite jurisprudents, as I have said, from the period of the Imam's occcultation.

Ali ibn Babawayh Qumi, died in 329 A.H. buried in Qum. The father of Shaykh Muhammad ibn Ali ibn Babawayh known as Shaykh Saduq, who is buried near Tehran. The son was learned in Traditions, the father in jurisprudence and compiled a book of his verdicts. Normally this father and son are called Saduqayn.

'Ayashi Samarqandi, lived at the same time as Ali ibn Babawayh or a little before. The author of a famous commentary of the Quran, though his speciality was commentary, he is still numbered amongst the jurisprudents. He wrote many books in different fields including jurisprudence. Ibn Nadim writes that the books of this man were largely available in Khorasan, but I have not yet seen his views related anywhere, and his books on jurisprudence no longer exist.

'Ayashi was originally a Sunni Muslim but later became a Shi'ite. He inherited vast wealth from his father, and this he spent on collecting and copying books and on teaching and training his students.

Ibn Jamid-Iskafi, one of the teachers of Shaykh Mufid. It seems he passed away in 381 A.H. and it is said that his books and writings numbered fifty. His views have ever been subject to consideration in jurisprudence and still are to this day.

Shaykh Mufid. His name was Muhammad ibn Muhammad ibn Naman. He was both a mutakalam (theologian) and a jurisprudent. Ibn Nadim, in the section of his book *Fihrist* in which he discusses Shi'ite mutakalamin, calls him "ibn Mu'alim" and praises him. Born in 336 A.H. he passed away in 413. His famous book in

jurisprudence, *Muqna'ah*, is still used today.

The son-in law of Shaykh Mufid, Abu Y'ala J'afari, tells us that Shaykh Mufid slept little at night, and spent the rest in worship, study and teaching or reciting the Quran. Seyyid Morteza, known as 'Alam ul Huda, born 355 A.H. and passed away in 436 A.H. Allamah Hilli has called him the teacher of the Shi'ites of the Imams. He was a master of ethics, theology and jurisprudence. His views on jurisprudence are still studied by the jurisprudents of today. He and his brother, Seyyid Razi the compiler of the *Nahj ul-balagha*, both studied under Shaykh Mufid.

Lesson Three: Brief History of Jurisprudence and Jurisprudents (2)

Shaykh Abu J 'afar Tusi, one of the shining stars of the Islamic world, wrote many books on jurisprudence and the principles of jurisprudence, Traditions, commentaries, theology and the transmitters. Originally from Khorasan (in east Iran), he was born in 385 A.H. and after twenty-two years emigrated to Baghdad which in those days was the great centre of Islamic studies and culture. He stayed in Iraq the rest of his life and after the demise of his teacher, Seyyid Morteza, the directorship of learning and the station of highest reference for verdicts (fatwas) was transferred to him.

Shaykh Tusi remained for twelve more years in Baghdad but then, due to a series of disturbances in which his house and library were ravaged, he left for Najaf where he formed the famous scholastic centre which still exists today. There, in the year 460 A.H., he passed away.

One of the books which were compiled about jurisprudence by Shaykh Tusi was called *An-Nahayeh*, and was used as a textbook for religious students. Another, *Masbut*, brought jurisprudence into a new stage and was the most famous Shi'ite book of jurisprudence of its time. In *Khelaf*, another of his books, he wrote about both the views of the jurisprudents of the Sunni schools and also those of the Shi'ite jurisprudents. He also wrote other books about jurisprudence, and, until about a century ago, whenever the name Shaykh was mentioned the man meant was Shaykh Tusi, and by Shaykhayn was meant Shaykh Tusi and Shaykh Mufid. According to what has been related in some books, it seems the daughters of Shaykh Tusi were also distinguished *faqih*at. [1]

Ibn Idris Hilli, one of the distinguished Shi'ite 'ulema. He himself was an Arab though Shaykh Tusi is counted as having been his maternal grandfather. He is known for the freedom of his thought; he broke the awe and reverence of his grandfather Shaykh Tusi and his criticisms of the jurisprudents bordered on impertinence. He died in 598 A.H. at the age of fifty-five.

Shaykh Abul-Qasim J 'afar ibn Hasan ibn Yahya ibn Sa'id Hilli, known as Muhaqqeq Hilli. Author of many books about jurisprudence, amongst them: *Sharay'e*, *Ma'arej*, *Al-Mukhtasar an-naf'i* and many others. He was the student of ibn Idris Hilli, and the teacher of Allamah Hilli who we are to speak about. In jurisprudence he has no superior. Whenever in the terms of jurisprudence the word *muhaqqiq* is used it refers to him. Great philosophers and mathematicians used to meet with him and used to sit in his lessons of jurisprudence. The books of Muhaqqiq, especially the book *Sharay'i*, has been a textbook for students and still is, while his books have been subject to the

commentaries of many other jurisprudents.

Ibn Hasan ibn Yusef ibn Ali ibn Mutahhar Hilli, famous as Allamah Hilli, one of the prodegies of the age. Books have been written by him about jurisprudence, principles, theology, logic, philosophy, transmitters and still other things. Around a hundred of his books have been recognised, some of which, I like *Tathkurat ul-fuqaha* are alone enough to indicate his genius. Allamah wrote many books on jurisprudence which have mostly, like the books of Muhaqqiq, been commented on by the jurisprudents who succeeded him. His famous books on jurisprudence include *Irshad*, *Tabsaratol Muta'alemin*, *Qawa'id*, *Tahrir*, *Tathhorat-ul-fuqaha*, *Mukhtalif ash-shia'* and *Mutaha*. He studied under various teachers: jurisprudence under his paternal uncle, Muhaqqiq Hilli, philosophy under Khawajeh Nasir ud-Din Tusi, and Sunni jurisprudence under the 'ulema of the Sunnis. He was born in the year 648 A.H. and passed away in 726 A.H.

Muhammad ibn Makki, known as Shahid Awal ("the First Martyr"), one of the great Shi'ite jurisprudents. He is of the rank of Muhaqqiq Hilli and Allamah Hilli. He was from Jabal 'Amel, an area in today's south Lebanon which is one of the oldest centres of Shi'ites and still is today a Shi'ite area. Shahid Awal was born in 734 A.H., and, in 786 A.H., according to the fatwa of a jurisprudent from the Maliki sect which was endorsed by a jurisprudent of the Shaf'i sect, he was martyred. He was a pupil of the pupils of Allamah Hilli, amongst them Allamah's son, Fakhr ul-Muhaqqeqin. The famous books of Shahid Awal on jurisprudence include *Al-lum'ah* which he composed during the brief period he remained in prison awaiting his martyrdom. Amazingly, this noble book was subject to a commentary two centuries later by another great jurisprudent who suffered the same fate as the author. He too was martyred and thus became called Shahid ath-Thani ("The Second Martyr"). The famous book *Sharh ul-lum'ah* which has been the primal textbook of the students of jurisprudence ever since is the commentary of Shahid th-Thani. Other books of Shahid Awal include *Durou*, *Thikra*, *Bayan*, *Alfiyeh* and *Qawa'id*. All of the books of the First Martyr are amongst the priceless writings of jurisprudence.

Shahid Awal came from a very distinguished family, and the generations that succeeded him preserved this honour. He had three sons who were all 'ulema and jurisprudents, and his wife and daughter were likewise jurisprudents.

Shaykh Ali ibn Abul ul-Ala Karaki, known as Muhaqqiq Karaki or Muhaqqiq Thani. One of the Jabal 'Amal jurisprudents and one of the greatest of the Shi'ite jurisprudents. He perfected his studies in Syria and Iraq and then went to Iran and for the first time the position of Shaykh ul-lslam went to Iran when it was entrusted to him. The order which the ruling king of Iran (Shah Tahmaseb) wrote in Mutaqqiq Karaki's name in which the king gave him complete control, declaring himself to be only his agent, is famous. A well-known book that is often spoken of in jurisprudence is Muhaqqiq Karaki's *Jam'i ul-Muqasid*, which is a commentary on the *Qawa'id* of Allamah Hilli.

The arrival of Mutaqqiq Thani in Iran and his establishing a religious university in Qazvin and then in Isfahan, together with his training of outstanding pupils in jurisprudence, caused Iran for the first time since the time of the Saduqayn to become a centre of Shi'ite jurisprudence. He died between the years 937 A.H. a-nsl 941 A.H.

He had been the pupil of the pupil of Ibn Fahd Hilli, who had been the pupil of the pupils of Shahid Awal, such as Fazlel Miqdad.

Shaykh Zayn ud-Din known as Shahid Thani, the "Second Martyr", was another of the great Shi'ite jurisprudents. A master of several sciences, he was from Jabal 'Amal and a descendant of a man called Saleh who was a student of Allamah Hilli. Apparently Shahid Thani's family was from Tus, and sometimes he would sign his name "At-Tusi Ash-Shami". He was born in 911 A.H. and martyred in 966 A.H. He travelled widely and experienced many teachers. He had been to Egypt, Syria, Hejaz, Jerusalem, Iraq and Istanbul, and wherever he went he learnt. It has been recorded that his Sunni teachers alone numbered twelve. Besides jurisprudence and principles he was accomplished in philosophy, gnosis, medicine and astronomy. Very pious and pure, his students wrote that he used to carry wood at nights to support his household and, in the mornings, sit and teach. He compiled and wrote many books, the most famous of them in jurisprudence being *Sharh lum'a*, his commentary on the *Lum'a* of Shahid Awal. He was a pupil of Muhaqqiq Karaki (before Muhaqqiq migrated to Iran), but Iran was one place that he himself never went to. The author of M'alim which is about the Shi'ite 'ulema was Shahid Thani's son.

Muhammad ibn Baqer ibn Muhammad Akmal Bahbahani, known as Wahid Bahbahani, who came in the period after the fall of the Safavi dynasty of Iran. After that overthrow, Isfahan was no longer the centre of religion, and some of the 'ulema and jurisprudents, amongst them Seyyid Sadr ud-Din Razawi Qumi, the teacher of Wahid Bahbahani, left Iran as the result of the Afghan turmoil and went to the *atabat*, the holy centres of Iraq.

Wahid Bahbahani made Karbala the new centre and there he tutored numbers of outstanding pupils, many of them famous in their own right. Besides this it was he who led the intellectual combat against the ideas of the *akhbariyyin*, which in those days were extremely popular. His defeat of the *akhbariyyin* and his raising of so many distinguished *mujtahid*s has led to him being termed as "*Ustad ul-kul*" ("The General Teacher"). His virtue and piety was perfect and his students maintained profound respect for him.

Shaykh Morteza Ansari, a descendant of Jaber ibn Abdullah Ansari, one of the great companions of the Holy Prophet himself. On a visit with his father to the *atabat* of Iraq at the age of twenty, the 'ulema, appreciating his genius, asked his father to let him stay. He remained four years in Iraq and studied there under the leading teachers. Then, due to a series of unpleasant events, he returned to his home. After two years he went once more to Iraq, stayed for two years, and again returned to Iran, this time deciding to benefit from the 'ulema in Iran. He set off to visit Mashhad and on the way visited *Hajj* Mulla Ahmad Nuraqi the author of the famous *Jam'i S'adat* in Kashan. This visit became a long stay as he benefited from the teachings of Mulla Ahmad in Kashan for three years. He then went to Mashhad and stayed there for five months. He also journeyed to Isfahan and to Burujerd in Iran and the aim of all these trips was to learn from men of knowledge. Around 1202/3 A.H. he went for the last time to the *atabat* and began giving lessons. After the decease of Shaykh Muhammad Hasan, he became recognised as the sole authority for referral for verdicts.

Shaykh Ansari is called the *Khatim ul fuqiha walmuitahidin* (the seal of the jurisprudents and the mujtahids). He was one of those who in the precision and depth of his views have very few equals. Two of his books, *Risa'il* and *Mukassib* are today's textbooks for (higher) religious students, and many commentaries have been written on his books by later 'ulema. After Muhaqqiq Hilli and Allamah Hilli and Shahid Awal, Shaykh Ansari is the first person whose books have been so regularly subject to commentaries. He passed away in 1281 A.H., in Najaf where he is buried.

Hajj Mirza Muhammad Hasan Shirazi, known as Mirza Shirazi. His preliminary studies took place in Isfahan and he then went to Najaf and took part in the lessons of Shaykh Ansari and became one of the Shaykh's leading and outstanding students. After Shaykh Ansari's demise, he became the leading authority of the Shi'ite world, and he remained thus until his demise about 23 years later. It was by means of this great man's prohibition of tobacco that colonialism 's famous monopoly agreement in Iran was broken.

Hajj Mirza Husayn Naini, one of the great jurisprudents and master of principles of the fourteenth century hejrat, a pupil of Mirza Shirazi, who became a highly valuable teacher. His fame is mostly in Principles, into which he introduced new views. Many of today's jurisprudents were his pupils. He died in 1355 A.H. in Najaf. One of the books he wrote was in Persian and was called *Tanaziyeh al-ameh* or *Hukumat dar Islam*, which he wrote in defense of constitutional government and its roots in Islam.

Summary and Review

In total we have introduced sixteen of the faces of the recognised jurisprudents from the time of the minor occultation until the end of the 13th century hejrat. We have only mentioned the jurisprudents that in the world of jurisprudence and principles are very famous, whose names and fame have been continually mentioned in lessons and books from their own times until today. Of course, there are many other such names we could have mentioned, but from those we have reviewed, certain points became clear:

First, ever since the third century A.H., jurisprudence has had a continuous existence. Throughout the whole of these eleven centuries, schools have operated with no period of stand-still and the relationship between teacher-student in all that time has never been severed. If we start with my own teacher, the late great Ayatollah Burujerdi, we can trace the line of his teachers back over a thousand years to the period of the Imams. Such a constant chain seems to have existed in no culture and civilisation other than the Islamic one.

Of course, as we stated before, we did not appoint the third century to begin with for the reason that Shi'ite jurisprudents began then, but because the period previous to that period was the period of access to the holy Imams, and during that time the brilliance of the Shi'ite jurisprudents was always dimmed by the brilliance of the Imams, and the jurisprudents had no independence of their own. Otherwise the beginnings of *ijtihad* and jurisprudence amongst the Shi'ites and the composing of books about jurisprudence occurred amongst the companions. The first treatise on jurisprudence was written by Ali ibn Ali Raf'i who was the brother of Abdullah ibn Abi Raf'i, the scribe and accountant of Amir ul Muminin, Ali (*'a*) during the period of

the Imam's caliphate.

Second, contrary to the perception of some, the Shi'ite sciences, amongst them jurisprudence, have not been developed and systemised solely by the 'ulema and jurisprudents of Iran. The 'ulema of Iran and the 'ulema of other lands have both shared in this great work, and, until the commencement of the tenth century and the emergence of the Safavi dynasty, non-Iranians were predominant. It is only since the middle of the Safavi period that predominance has been gained by Iranians.

Third, likewise, the centre of jurisprudence and of the jurisprudents has not always been Iran. At first Baghdad was the centre of Shi'ite jurisprudence, and then, by the action of Shaykh Tusi, the centre was transferred to Najaf. It was not long before Jabal 'Amal in today's south Lebanon became the centre. Then Hilleh, a small town in Iraq, and then for a while Halab, one of the districts of Syria. During the time of the Safavids it was transferred to Isfahan, while at the same time Najaf was revived by Muqaddas Ardebili and other greats and still functions today. Of the towns of Iran, it is only Qum that in the first centuries of Islam, due to men like Ali ibn Babawayh, was a minor centre of jurisprudence and the related studies while Baghdad was the main centre. During the time of the Qajar dynasty, Qum was revived due to the efforts of Abul Qasim Qumi and it was revived a second time in 1340 A.H. (i.e. 61 years before this translation) by the late Shaykh Abdul Karim Ha'iri Yazdi, and today it is one of the two great centres of Shi'ite jurisprudence. [2]

Fourth, the jurisprudents of Jabal 'Amal played an important role in the development of Safavi Iran. The Safavi dynasty, as we know, were inclined to Sufism. Their path was originally based on the methods and customs peculiar to Sufism. If they had not been corrected by the profound and unchallengeable understanding of the jurisprudents of Jabal 'Amal, and if a profound centre of Islamic studies not been established by those jurisprudents, things would have led in Iran to the same kind of condition that now exists in Turkey and Syria. This action of theirs had many effects. Firstly, the population and government of Iran remained immune from that deviation, and, secondly, Shi'ite Sufism likewise followed a more reasonable path. Thus, for founding the religious university in Isfahan, the jurisprudents of Jabal 'Amal-Muhaqqiq Karaki and others - have a lot to be thanked for.

Fifth, as has been pointed out by others, Shi'ism in Jabal 'Amal existed an age before it did in Iran, and this is one of the definite proofs and reasons for rejecting the views of those who consider Shi'ism to have been formed in Iran. Some believe that the Shi'ite penetration into Lebanon was due to the great companion of the Prophet, the mujahid Abuzar Ghaffari. During his stay in ancient Syria which included all or part of present Lebanon, at the same time as stiffly opposing the misappropriation of public wealth by Mu'awiyyah and the rest of Bani Umayyid, Abuzar also used to propagate the holy platform of Shi'ism.

Lesson Four: The Sections and Chapters of the Issues of Jurisprudence

For us to form an acquaintance with jurisprudence it is necessary for us to recognise its different sections. Previously we said that the range of jurisprudence is extremely wide, for it contains all the subjects related to all the actions about which Islam

contains instructions.

The famous classification of today is the same classification first introduced by Muhaqqiq Hilli in his *Sharay'i* and which Shahid Awal has briefly commented on and explained in his *Qawa'id*. Amazingly the most proficient of those who have composed commentaries of the book *Sharay'i* amongst them Shahid Thani in his *Masalik*, made not the slightest comment or explanation about the classification of Muhaqqiq, and the First Shahid in *Lum'a* has not even followed Muhaqqiq's system.

In any case, Muhaqqiq's classification is that all the issues of jurisprudence are divided into four parts: worship, two-party contracts, one-party contracts and (other) commands.

This division is based on the fact that the actions that must be performed in accordance to the Shari'iah are either such that a condition of their validity is the intention of nearness to God meaning that they must be done solely for God and if there is any other motivation for their performance the obligation is not fulfilled and they must be done again, or they are not subject to this condition.

If they are of the first type, like prayer, fasting, *khoms*, *zakat*, *Hajj* and so on, they are termed in jurisprudence as worship (*ibadat*).

If, however, they are of the second type and the intention of nearness is not a condition of their validity, and, supposing that they are performed with a different intention, are still correct and valid, then they are of two types: either their actualisation does not depend upon the execution of a special contract or it does.

Acts that do not depend upon the execution of a special contract, like inheritance, punishments, retribution and so on, are grouped together in jurisprudence under the heading commands, (*ahkam*). If they do depend upon the execution of a contract, then again they are of two types: either the contract must be recited by two parties, or there is no need for two parties and the contract is unilateral.

If they are of the first type, like selling, hire, and marriage, they are called contract (*aqd*), in which one party states the contract and the other agrees. If, however, one person can carry it out alone with no need of another party like the changing of one's mind regarding one's due, divorce and so on, it is called unilateral instigation.
In this classification all the sections of jurisprudence have been divided into fifty two chapters. Ten chapters of worship, nineteen of contracts, eleven of unilateral instigations and twelve chapters of commands.

One point is not to remain unmentioned. In the first and second centuries of Islam, the books of jurisprudence that were written were related to one or a few of the subjects of jurisprudence, not about all the subjects. For example, it is recorded that such and such a person wrote a book about prayer and such and such a person a book about marriage. For this reason, in later eras, when books about all the issues of jurisprudence were written, the different chapters of jurisprudence were all under the heading The Book. The custom is that instead of writing The Chapter of the Ritual Prayer, or The Chapter of the *Hajj*, we write, The Book of Ritual Prayer or the Book

of *Hajj*.

Now, in the order first used by Muhaqqiq Hilli, we will look at the different sections and chapters of the issues of jurisprudence.

Worship
There are ten books of worship:

1- The Book of Cleanliness (*kitab ut-taharat*).
Cleanliness is of two kinds: being clean of external, non-inherent, material filth and pollution; and being spiritually clean of inherent pollution. The first type of cleanliness means the body, clothes and other things being clean from the ten types of filth which include urine, faeces, blood, sperm, corpses and carcasses and so on and which are termed as *najasat*. The second type of cleanliness means entering the state of purity by performing the partial ablution, or total ablution or earth ablution, that is a condition of certain forms of worship like prayer and circumambulation of the Ka'ba and certain other things, and which is annulled by a series of natural things like sleep, urination, sexual intercourse and simple sperm discharge, and which must thereafter be re-entered.

2- The Book of Prayer (*kitab us-salat*).
In this book the obligatory prayers, i.e. the five daily ritual prayers, the prayers of *'id ul fitr* and *'id ul ahza*, the prayer for the deceased, the prayer of special signs such as earthquakes and eclipses, etc. and the prayer of the circumambulation of the Ka'ba; the *nafilah* prayers, i.e. the desirable prayers such as the daily desirable prayers; the conditions, preparations, essentials, preventions, delayers and annulers of prayer; and the qualities of prayer, such as the prayer of a person at home and the prayer of a person ruled as travelling, individual prayer and congregational prayer, the prayer offered at the right time (*ida*) and the prayer missed and made up for after its time (*qaza*), are all discussed in detail.

3- The Book of *Zakat*.
Zakat is a way of paying wealth that is similar to a tax and which is due from nine things :gold, silver, wheat, barley, dates, grapes, and animals of the cow family, animals of the sheep family, and animals of the camel family. In jurisprudence the conditions for *zakat* being due from these nine things; the amount of *zakat* due; and the ways it is to be spent are all discussed and, from the authentic sources and in the recognised ways, determined. In the Quran, *zakat* is mostly mentioned along with prayer, hut only that it is to be given and the ways it is to be spent has been explained; the rest is known from the Sunnah.

4- The Book of *Khoms*.
Khoms, like *zakat*, is a way of paying wealth that resembles a tax. *Khoms* means a fifth. In the view of the 'ulema of our Sunni brothers it is only a fifth of the spoils of war that is to be transferred to the Bait ul-mal, or public treasury of Islam, and it is to be spent for the public benefit. In the Shi'ite view, however, spoils of war is just one of the things from which *khoms* must be paid. In addition, profits of mining, the finding of buried treasure and of diving in the sea, wealth that is mixed with illegitimate wealth when unable to discern the amount and/or the owner, land that a *thimmi* kafir [3]buys from a Muslim, and that which exceeds one's yearly expenses

from one's yearly earnings, must all be divided into five and one of those fifths be given as *khoms*. *Khoms* in the Shi'ite path of religion is the great budget that can secure the important part of the budget of the state.

5- The Book of Fasting (*kitab us-sawm*).
As we know, in a state of fasting, one must refrain from eating and drinking, from sexual intercourse, from immersing one's head in water, from breathing in dust (even as far as the throat) and from certain other things. For one month each lunar year, the blessed month of *Ramazan*, is obligatory for every mature, sane person who is not ruled as an exception (like a ruled traveller or a woman having her monthly period) to fast each day from daybreak until sundown. Other than in the month of *Ramazan* fasting is generally desirable. On the two festivals, fasting is forbidden, and on certain other days, like the day of 'Ashura, it is undesirable (*makruh*).

6- The Book of Taking Seclusion (*i'tikaf*)
This literally means "to reside in a specified place" In the terminology of jurisprudence, however, it means a type of worship whereby a person resides in a mosque for three days or more, not setting foot out of the mosque, and fasting each day. This has laws and conditions that are determined in jurisprudence. In its essence *i'tikaf* is desirable, not obligatory, but if it is begun and kept up for two days, the third day becomes obligatory. I'tikaf is to be performed in the Masjid ul-*Haram* in Mecca or the Masjid un-Nabi in Medina, or in the masjid of Kufa in Iraq or the masjid of Basreh in Iraq, or at least in the major masjid of a city. *I'tikaf* in minor masjids is not permissible. The Holy Prophet used to perform *i'tikaf* during the final days of the month of *Ramazan*.

7- The Book of *Hajj*
Hajj is that famous act of worship performed in Mecca and the outskirts of Mecca that is normally linked to '*umrah*. The performance of the *Hajj* consists of binding *ihram*[4] upon oneself in Mecca, a stay in 'Arafat, a stay for a night in Mash'ar, the symbolic ceremony of throwing stones at the furthest (of three) boulders, the sacrifice, the shaving of the head for men and the cutting of a few curls for women, circumambulation (walking seven times around the Holy Ka'ba), the prayer of the circumambulation, the walking of seven times between the two hills of Safa and Marwah, the final circumambulation, the prayer of the final circumambulation, throwing stones at (all three of) the boulders, and the night stays at Mina.

8- The Book of *Umrah*.
Umrah is a kind of lesser Pilgrimage. Normally it is obligatory for those about to perform the *Hajj* to perform the *Hajj* '*Umrah* first. The actions of '*umrah* are as follows:

Binding "*ihram*" on oneself at one of the special places (*mi'qat*); circumambulation; the prayer of circumambulation; walking seven times between Safa and Marwa; and, finally, the cutting of a few hairs or a fingernail or toe nail.

9- The Book of *Jihad*.
This book deals with the issues concerning Islamic warfare. Islam is a religion of society and community and of the responsibilities of society, and for this reason it includes a law of jihad. There are two types of jihad: *ibtida'i* (to be begun by

Muslims) and *defa'i* (defensive). In the view of Shi'ite jurisprudence, *ibteda'i* jihad can only take shape under the direction of the Holy Prophet or one of the twelve immaculate and perfect Imams, otherwise it is forbidden. This type of jihad is obligatory only on men, but the other jihad, the jihad of defense, is obligatory on both men and women whenever the conditions demand it.

In the same way, jihad can be either internal or external. If some of the people for whom obedience to the Imam is obligatory rise up against him, just as the Khawarij at Nahrawan and other places, Talha and Zubayr at the battle of Jamal and Mu'awiyyah and his companies at Siffin all rose up against Amir ul-Muminin, Ali, internal jihad is also obligatory against them.

In jurisprudence, the laws of jihad and of *thimmeh*, the conditions for allowing non-Muslims to live in the Islamic state as citizens of the state, and of peace between the Islamic state and non-Islamic states are all discussed in detail.

10- The Book Commending to what is Recognized:-as good-and Prohibiting from what is Rejected-as bad (*amr bi m 'aruf wa nahyan al-munkar*)
Because Islam is a religion of society and of the responsibilities of society, and sees its orderly environment as the essential condition for the inaction of its heavenly programs and the bestowing of prosperity and fulfilment, it has brought into existence a shared general responsibility. We are all duty-bound to be guardians of virtue and goodness, and to combat evils and wrongs. The guarding of virtue and goodness is named *amr bi m'aruf* and the combating of evil and wrongs, *nahyan al-munkar*. The conditions attached to these duties and their stipulations and regulations are all stated in jurisprudence.

Here, our concise glimpse at the ten parts of the section of worship comes to an end, and it is now the turn of the contracts.

Lesson Five: Contracts (*'oqud*)

The second section, according to our classification, consists of the contracts and includes nineteen books:

1- The Book of Buying and Selling (*kitab ul-bay'i*)
This book deals with buying and selling, the conditions which the two parties (the buyer and seller) must meet, the conditions of the two commodities exchanged, the conditions of the contract and the type of transaction: cash transactions; *nisiyah* transactions which are transactions wherein a commodity is given cash and the payment after a period and *salaf* transactions which are the opposite of *nisiyah* transactions, i.e. a sale wherein payment is immediate and the commodity is not put at the buyers disposal until after a period. Transactions wherein both the payment and the product are to be exchanged after a period are null and void. Similarly, in the chapter of selling, advantageous transfers, disadvantageous transfers and advantageless transfers are also discussed. What is meant by advantageous transfer (*marabihah*) here is that a person makes a transaction and then, after having made some profit, transfers it to someone else. A disadvantageous transfer (*muwadah*) is the opposite, meaning a transaction which, after having suffered some loss and damage, is transferred to someone else. And what is meant by an advantageless transfer

(*tuwliyah*) is that a transaction is transferred to someone else having made no profit nor having suffered any loss.

2- The Book "*Rahn*".
Rahn means mortgage. In this book of jurisprudence the laws of mortgaging are studied.

3- The Book of the Bankrupt (*muflis*)
Muflis means "the bankrupt", i.e. a person whose holdings do not meet his liabilities. In order to investigate the liabilities of such a person, the Hakim-Shari'ah i.e. a *mujtahid*, can prohibit him from the right to his possessions until an exact investigation is made and as far as possible the liabilities be paid.

4- The Book of Prohibition (*hajr*)
Hajr means prohibition. What is meant is the prohibition of making use of property. In many cases, the use of property by the original owner is prohibited. As we have seen, the bankrupt is one instance. Another is an immature child (i.e. a girl under nine or a boy under fifteen). The insane, the person sane in other ways Ibut who always spends his money foolishly like spending all his money on clothes when he is desperately in need of food, are other instances.

5- The Book of Liability (*diman*)
Liability is that a person accepts the liability of another person's debts. There exists a difference between Shi'ite jurisprudents and the jurisprudents of our Sunni brothers about the reality of liability. In the view of Shi'ite jurisprudents *diman* is the transference of the obligation of a debt from the debtor to a party that accepts liability, and is only valid with the consent of the creditor, and in Shi'ite jurisprudence, once the liability has been transferred, the creditor has no longer the right to seek it from the person who has made himself liable. Of course, if the liability was urged on the liable by the debtor, then, once he has cleared the debt, the liable can take that amount from the first debtor. In the view of Sunni jurisprudence, however, it is the annexing of the obligation of the debt onto someone else, who also becomes obliged to repay the debt. Which means that after the contract of liability, the creditor has both the right to seek the debt from the original debtor and also from the person who has made himself liable.

Sometimes two other chapters, *hawalih* (another kind of liability) and *kafalah* (a kind of bail system) are also included in this book.

6- The Book of Peace (*sulh*)
The *sulh* (peace) that is studied in this book is different from the *sulh* that is studied in the book of jihad. Sulh in the book of jihad means "political agreements", whereas the Book of Peace concerns property affairs and common rights. For example, if a debt is owed without the amount of the debt being precisely known, the two parties make a *sulh* agreement and settle on a specified sum. *Sulh* agreements generally occur as a settlement for arguments and disagreements.

7- The Book of Partnerships (*sharikat*)
Sharikat is that a property or a right belongs to more than one person. For example, if some brothers inherit their father's property, then, for as long as they do not divide it,

they are partners in that property. Or, for example, two people together buy an automobile or a house or a piece of land. Or it may happen that a group of people together take possession of a piece of land that belongs to no one by reclaiming, say, and restoring a part of a desert or marshland. Furthermore, a partnership is sometimes accidentally forced on someone, like, for example, when the wheat of two farmers accidentally becomes mixed and to separate the wheat of one from the wheat of the other is not possible.

There are two types of partnership existing in Islam, contractual partnership and non-contractual. The examples previously cited were non-contracted partnerships. A contractual partnership is that two people or a group of people by an agreement, compact and contract, form what in English is called a company, such as a trading company, a farming company or an industrial company. Contractual partnerships or companies are subject to many laws which are still studied in jurisprudence. In the Book of Partnerships the laws of profit sharing are also discussed.

8- The Book of the Partnership of Capital and Labor (*mudarabah*)
A *mudarabah* is a kind of contractual partnership, but not a partnership of two or more investors. Rather it is a partnership of capital and labour, meaning that one one or more partners provide the capital for a trading business and one or more partners provide the labour of the actual trading. Firstly the partners must be in concord as to the division of profits, and then the contract of *mudarabah* is to be executed, or must at least be formed in practice.

9- The Book of Agricultural Partnerships (*mazaro'at* and *musaqat*)
Mazara'at and *musaqat* are two more types of partnership. They are like *mudarabah*, which we have just mentioned, in that they are both types of partnerships between capital and labour. The difference is that *mudarabah* is relevant to trading whereas *muzara'at* is for farming. The meaning of this is that the owner of land and water makes an agreement with someone else who does the actual farming and they are in concord as to the specified proportion of each party in the division of the profits. Likewise, *musaqat* is for the affairs of orchards. This means that the owner of fruit trees concludes an agreement with someone else who becomes responsible for all the work involved in looking after those trees, such as watering them and all the other things effective in fruit production, and, according to the specified proportion they agree upon in the actual agreement, both investor and worker take their share of the profits.

Here there is a point that wish to mention, which is that in partnerships between capital and labour, whether *mardarabah* agreements or *mazara'at* or *musaqat*, any kind of harm or loss the capital is subject to is born by the owner of the capital, the investor. And, likewise, there is also no certainty of making a profit on the capital, meaning that it is possible a profit will be returned, and it is possible that a profit will not be returned. The only profit that is returned to the owner of the capital is in accordance to the profit made by the partnerships and to his specified proportion of those profits. Here it is that the financer, just like the worker, might make no profit, and it is even possible that he may lose his capital and even become bankrupt.

In the world of today, however, even in most parts of the Muslim world, bankers put their aims into practice by means of usury and as a result they receive a specified

profit in all circumstances, whatever the types of concern they finance. Should one of the concerns that they have financed return a loss instead of a profit, the manager of that concern is absolutely obliged to return the banker's profit, even if he has to sell his house. Likewise, in the system of most of today's world, the financer never goes bankrupt; on the basis of the system of usury the financer has entrusted his capital to the hands of the manager, which the manager has to repay many times over, and whatever happens the banker demands that profit, even if the capital has suffered a misfortune or even been lost.

In Islam, profiting from capital in the form of usury, i.e. the action of lending money and demanding the repayment of the loan whatever the circumstances with an addition of an amount of profit is strictly and severely prohibited.

10- The Book of Trusts (*wadiy'ah*)
Wadiy'ah, or trust, means the entrusting of property with someone and making that person one's agent in keeping and safe-guarding it. This in turn creates duties for the trustee and, if the property suffers or is lost, and the trustee has performed and observed those duties, he is not liable.

11- The Book of Lending (*ariyah*)
Ariyah is that a person receives the property of a second person in order to benefit from its benefits. *Ariyah* and *wadiy'ah* are two types of trusts, but in *wadiy'ah* the owner entrusts his property to be kept and safe-guarded and without his permission the trustee has no right to make use of it in any way. *Ariyah*, however, is that the owner from the very beginning gives it to the other for him to use and then return.

12- The Book of Hire (*ijareh*)
In Islam there are two types of hire, either it is that a person cedes the benefit of his property to another in return for an amount of money which is called "the money of hire" (*mal-ijareh*), such as the normal practices of hiring out one's house or car; or it is that a person hires himself and, in the terms of jurisprudence, becomes *ajir*; which means that he makes an understanding that in return for carrying out a special work, like repairing a pair of shoes, cutting a person's hair, or building his house and so on, he will receive a wage. or payment. Hire is similar to buying and selling in as far as both involve an exchange. The difference is that in buying and selling the exchange is of a thing and money, while in hire the exchange is of the benefit of a thing and money. Hire also has an aspect in common with *'ariyah* in that both the hirer and the *'ariyah* trustee make use of a benefit, the difference being that the hirer, having paid the price of the hire, is the owner of the benefit, while the *'ariyah* trustee is not the owner of the benefit, he only has the right to make use of it.

13- The Book of Representatives (*wakalah*)
Sometimes it occurs that one needs to have a representative for those works which demand a contract. Marriage and divorce are good examples, for the contracts of marriage and divorce must be verbally recited in correct and valid Arabic the person who is represented is called the *muwakkil* and the representative is called the *wakil*, while the act of representation itself is called *takwil*.

14- The Book of Endowments and Charity (*waqf* and *sadaqat*)

An endowment is that which a person sets aside from his property for a special use. In defining *waqf* it has been said that it means safe-guarding the original article of *waqf*, making it untransferrable, while freeing its benefits. About whether an intention of *qorbat,* of nearness to God, is a condition of *waqf* or not there is a difference of opinion. The fact that it is included in this section is because Muhaqqiq Hilli did not consider the intention of *qorbat* to be an essential condition. In any case, there are two types of *waqf*, general\ *waqf*, and special *waqf*. Both these and the commands of charity are discussed in detail.

15- The Book of Temporary Endowments (*sukna* and *habs*)
Sukna and *habs* are similar to *waqf* with the difference that in *waqf* the original property or wealth is guarded forever and there is no longer any possibility of it being someone's property, whereas *habs* is that a person designates the benefits of his property for a specified period to be spent in a charitable way, and after that period it again becomes his personal property. *Sukna* however, is that a person designates a dwelling for the use of a poor, deserving person for a period and at the end of that period it becomes exactly the same as the owner's other property.

16- The Book of Giving (*hebat*)
One of the effects of ownership is that one has the right to give one's property to others. Giving is of two types: "in exchange" and "not in exchange". Not in Exchange means that in return for one's gift one receives nothing in return. Giving in Exchange, however, means that one receives something in return for one's gift. Something given in exchange is not retrievable, i.e. it cannot be taken back. When something is given not in exchange, however, if it is given between the mahram members of a family, or if the gift itself is lost or broken, it cannot be taken back, otherwise it can, and the giver can nullify the transaction.

17- The Book of Wagers (*sabq* and *rimayah*)
Sabq and *rimayah* are two forms of betting agreement between the competitors of horse races, camel races or shooting competitions. *Sabq* and *rimayah* are forms of gambling, yet, because they are for practicing the martial arts necessary for jihad, they have been counted by Islam as permissible encouragement for the actual participants. Of course, this permission does not extend to other than the participants.

18- The Book of Wills (*wasiyat*)
This book is related to the enjoinments that a person wills to be performed after his death regarding his wealth or his children, whose guardian he is. Each person has the right to appoint a person as his executor (*wasi*) to be the guardian of minors amongst his children after his death; to supervise their education and other affairs. In the same way, each person also has the right to have spent after his death up to a third of his wealth in accordance with the stipulations he makes in his will.

19- The Book of Marriage (*nikah*)
First the conditions of the actual contract are discussed, such as the *muharam*, the people for whom to marry each other is forbidden, such as father and daughter, mother and son, brother and sister, and so on. The two types of marriage are included: permanent and temporary. Disobedience to the husband by the wife and the ill-treating of the wife by the husband and the obligation of the man of the house to economically provide for his wife and children are part of this book. There are a few

other issues that are also discussed.

Lesson Six: Unilateral Instigations (*iyqa'at*)

This part, according to the classification we are following, consists of *iyqa'at*, which, as has been explained, are the actions in need of a contract, but not of a two sided contract; a unilateral contract is enough. There are fifteen of these:

1- The Book of Divorce (*talaq*)
Divorce here means the cancelling of the marriage compact by the husband. Divorce is either *ba'in* or *raj'i*. Ba'in is the kind of divorce wherein the man has no right to return to the woman. A *raj'i* divorce is that in which the man can return. What this means is that for as long as the woman's special period of restraint (*'iddah*) has not come to an end, the man can return to the woman and thus nullify the divorce. A divorce is a *ba'in* divorce either because the wife has no *'iddah*, like a divorced woman with whom the husband has not had sexual intercourse, or a woman who has reached the age of menopause, or because, even though the woman must keep *'iddah*, the nature of the divorce disqualifies the man's right to return, like the third consecutive divorce of that couple, in which case, until she marries someone else who has sexual intercourse with her and then himself dies or divorces her and she keeps another *'iddah*, the first husband cannot re-marry her.

It is a condition of divorce firstly that, at the time of the divorce, the woman is clean of her monthly period. Secondly, there must be two just witnesses present when the contract of divorce is recited. Divorce is divinely detested. The Prophet of God tells us:"The most-detested permissible (thing) before God is divorce".

2- The Book of Divorce Wholly or Partly Instigated by the Wife (*khul'a* and *mabarat*)
Khul'a and *mabarat* are two types of *ba'in* divorce. A *khul'a* divorce is a divorce motivated due to the wife being dissatisfied with the marriage and giving the husband something or by releasing him from all or part of the mehr [5] so as to persuade him to divorce her. In this case, just by the man divorcing his wife, he is disqualified from returning to her, unless she wants to take back what she ceded, in which case the man has the right to return to her.

Mabarat is also a type of *ba'in* divorce, like *khul'a* with the difference that both parties are dissatisfied with the marriage, while the wife still gives the husband a sum to divorce her. The other difference is that the given sum in *khul'a* divorce has no specified limit, but in *mabarat* it is a condition that the sum be not more than the amount of the *mehr*.

3- The Book of Illegal Divorce (*zahar*)
In the "ignorance" of pre-Islamic Arabia, *zahar* was a kind of divorce consisting of the husband saying to the wife *anti 'aliya kazohriammi*, i.e., "You are like the rear of my mother to me." And this was quite enough for the wife to be recognised as divorced. Islam changed this. In the view of Islam, *zahar* is not divorce. For a man to recite this contract to his wife is forbidden, and he must pay a fine (*kafarah*). Until he pays the fine it is forbidden for him to have sexual intercourse with the wife. The fine of *zahar* is the freeing of a slave, or, if not possible, fasting each day for two

consecutive months, or, if this is not possible, the feeding of sixty poor people.

4- The Book of Vows of Abstention (*Iyl'a*)
Iyl'a is a general word meaning oath, but in jurisprudence it has a special meaning, which is that in order to annoy his wife, a man recites a contract swearing that he will not have sexual intercourse with her ever again or for a fixed period (four months or more). If the wife protests to the Hakim Shari'ah, he will oblige the man to one of two things: break the vow or divorce his wife. If the man breaks his vow, he must, of course, pay the fine. To break a vow is always forbidden but in these circumstances it is obligatory.

5- The Book of Cursing (*l'aan*)
L'aan is again related to the marital affairs of man and wife. It means their cursing of each other, and it applies to a situation wherein the husband accuses his wife of immorality, meaning here adultery or lesbianism.

If someone accuses a woman of the said immorality and cannot produce four just witnesses, the punishment of falsely accusing is to be carried out upon that person himself, and the same applies if a man accuses his wife. Now, if the man accuses his wife and cannot produce four witnesses, then rather than punish him, something else can be done. What can be done is called *l'aan*. If this takes place, however, although he is no longer subject to the other punishment, his wife becomes forbidden to him forever.

L'aan takes place in front of the Hakim Shari'ah. As we said before, *l'aan* is a way in which the two parties curse each other. It takes place like this: first the man stands up in front of the Hakim and says four times, "God is my witness, I am truthful in my claim." The fifth time he says, "God curse me if I lie in my claim." The woman then stands up in the presence of the Hakim and says four times, "I call God as a Witness that in his claim he is a liar." The fifth time she says, "The Anger of God be upon me if in his claim he is truthful."

6- The Book of Freeing (*itq*)
Freeing means the freeing of slaves. In Islam a series of legislatures has been introduced about slaves. Other than the making of slaves of captives taken in war, Islam considers no other form of slavery as legitimate. Furthermore, the aim of taking slaves in Islam is not to profit from them, rather it is for them to stay for a period in the homes of genuine Muslims and come to understand the Islamic teachings. This, all by itself, would draw them to the appreciation and acceptance of Islam and its sublime teachings. In reality, this form of slavery is the passage between the slavery of disbelief (*kufr*) and the freedom of Islam. So the aim is not that slaves remain slaves forever, the aim is for them to fully discover the Islamic teachings and their liberating effect, and earn the real, spiritual freedom in the freedom of society. Therefore, freedom after slavery is the aim of Islam.

Islam has provided many systems of *itq*. Because the goal of Islam is freeing and not enslaving, the jurisprudents have titled the book dealing with slavery the Book of Freeing and not the Book of Enslaving.

7- The Book of Acquiring Freedom through Will, by Purchase and Through Relationship (*Tadbir*, *mukatibeh* and *istilad*)
Tadbir, *mukatibeh* and *istilad* are three of the ways in which slaves are freed. *Tadbir* is that the owner stipulates in his will that after his death his slave is free. *Mukatibeh* is that a slave settles an agreement with his owner that by paying a sum (or agreeing to pay a sum in the future) he will become free. In the Quran it has been stipulated that if such an application is made by a slave in whom good is discerned, meaning that belief is discerned in them, (or that it is discerned that they can manage themselves and not become helpless), not only is the application to be accepted but they are also to be given capital from their owners' wealth.

Istilad concerns a slave woman who is made pregnant by her owner. Such a woman, when the owner dies, definitely becomes part of the inheritance, a part of which is inherited by her child, and since no one can be the slave of one's parents, grandparents and so on up, or children and grandchildren and so on down, she automatically becomes free.

Similarly, there are many other ways slaves become free, such as a slave being afflicted by blindness and so on; as the *kafarah* (fine) of various sins, one of the forms of which, as we have seen, is freeing a slave; being freed by someone simply to please God; and others, and these are generally discussed in the Book of Freeing.

8- The Book of Confessing (*iqrar*)
Iqrar is related to the Islamic laws of arbitration. One of the means by which a case is proved against a person is the person's own confession. If, for example, a person claims that he is owed something by a second person, he must produce evidence or testimony, and, if he does not, his claim is rejected. Should, however, the second person himself confess to the debt, this confession renders evidence and testimony unnecessary. Confession is accepted only from sane adults.

9- The Book of Reward (*ja'alah*)
Reward in its essence is similar to the hiring of people. In hire, however, a specific person is hired to do a specific work in return for a specific sum, whereas in reward no certain person is hired. Instead, the hirer simply announces that whoever does a certain work for him (like finding his missing child, for example) will be paid a certain sum as a reward.

10- The Book of Vows (*ayman*)
If a person swears to do a certain thing, the doing of that which he has sworn to do becomes obligatory for him. One condition is that the vow is in the Name of God. Therefore, a vow made in the name of the Prophet or of an Imam or the Quran, is not binding on him according to the Divine Law. Another condition is that what he vows to do is ruled as permissible in the Shari'ah, so a vow to do something that is ruled as forbidden (*haram*) or repulsive (*makruh*), is meaningless and not at all binding. A legitimate vow would be like one swearing to study a certain beneficial book from beginning to end, or swearing to brush one's teeth at least once a day. The breaking of such a vow necessitates a fine (*kafarah*).

11- The Book of Taking an Oath (*nathr*)

Nathr is a type of undertaking to do something that involves an oath but no special contract. If, for example, one makes an oath to pray all the daily *nafilah* prayers, i.e. the encouraged prayers that accompany the obligatory prayers of the day, all one has to do is declare that one will pray the *nafilah* prayers. As we saw, one of the conditions of the *ayman* vows was that the object of the vow be not forbidden (*haram*) or repulsive (*makruh*), so that there is no obstacle to the vow being simply permissible. The condition of *nathr*, however is that the object of the vow be useful in some way. So any *nathr* to do something or to refrain from something which is not beneficial, meaning that the doing and the refraining from the action in question, are both equal, is void. As in the *ayman* vows, the breaking of a *nathr* warrants a fine.

The inner meaning of *ayman* and *nathr*, and of the necessity of acting in accordance to them, lies in the fact that both are types of compact with God, and, in the same way that one must respect one's compacts with the creatures of God ("*O you who believe, be loyal to your compacts*". [15:1]), so is one to respect one's compacts with God Himself. An *ayman* or a *nathr* is normally made when one has little confidence in one's willpower. By means of the *ayman* or *nathr* one makes a thing obligatory for oneself until one is able to form the desired habit. [6]

Lesson Seven: Laws

The ninth section of the four sections of jurisprudence consists of the issues grouped under the heading of 'laws' (*ahkam*). This word used here has no special definition. The fact is that those issues of jurisprudence that do not fall into one of the other three groupings have been grouped together to form this one. This section contains twelve books:

1- The Book of Hunting and Slaughtering (*sayd* and *thibh*)
First it is necessary to state that the meat of permitted meat animals becomes permitted either when the animal is slaughtered in a special way (*thibh* or *nahr*), or, if the animal is a wild animal the meat of which is permitted, when it is properly hunted by specially trained dogs or my means of an iron missile (like a sharp arrowhead or a sharp bullet).

The meat of tame permitted-meat animals is not permissible to eat if they are hunted, and they must be slaughtered in exact accordance to the Shari'ah. The way of slaughtering most tame animals, like hens, sheep and cows, etc., is called *thibh* and the way of slaughtering camels is called *nahr*. There is a slight difference between the actual acts of nshr and *thibh*, but the conditions, such as the slaughterer being a Muslim, and killing the animal in the Name of God, are the same.

Hunting is related to permitted meat animals that are wild, like deer and mountain goats, etc If the means by which the animal is hunted is a dog, the dog must be so trained that it will do whatever it is commanded, and thus reflect its master's will, and the meat of permitted meat animals that are hunted and killed by dogs that are not trained in this way must not be eaten. In the same way, hunting with animals other than dogs, like hawks, is also not permissible.

In hunting by non-animals means, it is a condition that the weapon be iron, or at least metal, and it must be so sharp that it kills the animal by its sharpness. So hunting with

stones and blunt metal missiles is not permissible. In both forms of hunting, just like in both forms of slaughtering, the conditions that the man responsible for the animal's death, he the hunter, be a Muslim, and that he begins in the Name of God, must be met for the meat of that animal to be permissible. There are other conditions but they are detailed and here is not their place.

2- The Book of Eating and Drinking

Islam has a series of instructions concerning the gifts of nature as regarding eating and drinking. The laws of slaughtering and hunting are amongst these, and so are the laws of eating and drinking. In the view of Islam, all good things, i.e. things that are beneficient and useful, are permitted, while all foul things, things that are not beneficial and which are abominable for man, are forbidden. Furthermore, Islam has not contented itself with explaining these generalities but has made it clear that a whole group of things are foul and must be shunned, and that other things are good and there is no obstacle to the making use of them.

Eating means either the eating of meat or the eating of other things. Meat is either from the creatures of the sea or of the land or of the air. Of the creatures of the sea only fish are permissible, and then again only the fish that have scales. [7] The creatures of the land are of two types: tame and wild. The tame animals, the meat of which is permissible to eat are cows, sheep, camels, hens, horses, donkeys and mules which are all permissible, though the eating of the meat of horses, donkeys and mules is undesirable (*makruh*). The meat of dogs and cats and pigs is forbidden. Of the wild animals, the meat of carnivorous animals and insects is forbidden. The meat of deer, however, and of wild cows and goats and other wild animals that are permissible when tame, is permissible. The meat of hares and rabbits, though they are not carnivorous, in accordance to the famous verdict of the 'ulema is forbidden.

Of birds, the meat of the different types of pigeon, partridge, ducks, domestic hens and so on are permissible. The meat of hunting birds is forbidden.

In the cases where the Shari'ah has not made clear the status of the meat of birds, there are two signs of its being forbidden. One is that when the bird flies it does not need to flap it's wings all the time and mostly glides. The other is that it has no crop, or no gizzard or no sign of a bump on the back of its leg.

Other than animals: to eat or drink any kind of intrinsic filth (*najasat*) like urine, faeces, blood, sperm, alcohol, etc., is forbidden, and the same applies to any intrinsically clean thing that intrinsic filth has dirtied and which is called *mutunajas*. Similarly, to eat or drink anything that is harmful to the body, the harm of which is considered significant like poison, for example, is also forbidden. If medicine discerns that a certain thing, tobacco for example, is definitely harmful to the body, to the heart, let's say, or to the nerves, and shortens one's life expectation or produces cancer, then its use will be forbidden. If it is not consequential, however, and is simply like breathing the air of most cities, it is not forbidden.

For a pregnant woman to consume something which leads to the abortion of her child, or for a person to consume something that leads to disorder of the senses, or for a man to consume something that leads to his sterilization, or for a woman to consume

something that leads to her permanent sterility, is forbidden.

To eat earth is absolutely forbidden, whether it is harmful or not. The drinking of intoxicating liquors is also absolutely forbidden. Furthermore, to consume that which belongs to another without the consent of the owner is strictly forbidden, but this is an incidental prohibition, not intrinsic.

Some parts of permitted-meat animals is forbidden, including the spleen, the testicles and generative parts. Likewise, the milk of forbidden-meat animals is also forbidden.

3- The Book of Misappropriation (*ghasb*)
Misappropriation (*ghasb*) means the taking or using of the property of another by force, i.e. without the other's permission. Firstly, this is forbidden. Secondly, it renders the misappropriator (*ghasib*) liable, so that if the property is damaged or destroyed while in the control of that misappropriator he is liable for it whether the loss or damage was his fault or not. Whatever use one makes of misappropriated property is forbidden. *Wuzu* taken with misappropriated water and prayer in misappropriated clothes or in a misappropriated place is void.

At this point, it must be known that in the same way mis-appropriation results in liability, so destruction causes liability. Meaning, for example, that if a person smashes someone else's window, he is liable for it. Causing likewise, produces liability. Causing here means that if someone does not do any direct damage, like smashing a window, but does something that causes damage, he is liable. If a man, for example, leaves a thing like the skin of some fruits on a public walk-way and a person slips on it and as a consequence suffers dam age, that man is responsible for the damage suffered by the person who slipped.

4- The Book of Right of Preference (*shaf'ih*)
Shaf'ih means the right of precedence of one partner to buy the share of the other. If two people are legitimate partners according to the Shari'ah and one of them wants to sell his share, the other partner, if he wants to buy that share for the same terms and price for which others wish to purchase it, has the right of precedence.

5- The Book of Enlivening the Dead (*ihiya al'muwt*)
This book concerns wasteland, i.e. land that is dead or barren, that by the absence of buildings or farming and suchlike is lifeless. The Holy Prophet told us: "Whoever enlivens a dead land owns it." This issue has many facets and these, in jurisprudence, are discussed at length.

6- The Book of Finds
In this book are discussed the laws of finding things the owners of which are not known. The find is either an animal or other than an animal. If it is an animal and such as will not be harmed if left alone, the finder has no right to take it into his control. If the animal might be harmed if left alone, however, like a sheep in the middle of the desert, the finder can take it into his control, but he must search for its owner. If the owner is found, the animal must be returned to him, and if the owner is not found, with the permission of the Hakim Shari'ah, the animal must be given to the poor.

If the find is not an animal, and its value is less than that of 2.32 grams [8] of minted silver, the finder can keep it for himself, but if it is more he must search for the owner for one year (unless, like fruit, it cannot be kept for a year). If the owner is not found, and if the find was not made in the sacred area of Mecca, the finder has the option of doing any of three things. Either he can use it for himself with the intention that if the owner is discovered, he will repay the find itself or its value to the owner, or give it as charity with the same intention, or he can keep it in the hope that the owner will be found.

If the find has no special signs the search for the owner is not necessary and the finder has the same three options from the time of the find.

7- The Book of Inheritance.
We know that in Islam there are laws of inheritance. Inheritance in Islam is not a matter of choice. In Islam, a person has no right to specify a certain sum for a certain heir, or, for example, to leave all his wealth to a certain heir. After a person's death, his wealth (apart from "his" third which he can stipulate in a will to be disposed of however he likes) is divided and shared amongst the heirs in accordance to the relevant laws.

The heirs in the view of Islam form different ranks. By the existence of one of the members of the first rank, the inheritance does not reach to the second, and the third rank only inherits if there is no one from the first and second ranks to inherit.

The first rank consists of the deceased's parents and sons and daughters and, if the sons and daughters have died, the grandchildren.

The second rank is the deceased's four grandparents and brothers and sisters and, if the brothers and sisters have themselves passed away, their children.

The third rank is the deceased's uncles and aunts and their children.

Until here, of course, we have spoken only about inheritance of kin. There is other inheritance as well, the inheritance of husband and wife, and they inherit their share one from the other before the inheritance of any of the three ranks. About what is the share of each of the members of the ranks and of the husband and wife, however, is too detailed a subject to go into here.

8- The Book of Arbitration (*qaza*)
The issues of arbitration, i.e. the settling in court of differences and disputes, are so many that we cannot even summarise them. Briefly, we can say that the system of arbitration in Islam is a special system. The justice of the arbitrator (*qazi*) is subject to extraordinary attention in Islam. So much precision has been given to the knowledgeable personality of the arbitrator that he has to be a *mujtahid* and an expert on Islamic rights. About his moral and ethical competence, endless diligence has been introduced. He must be free from all types of sin, even those that do not directly affect his work. In no way does he have any right to accept payment from either of the two parties, even after the arbitration. His expenses are to be liberally reimbursed from the public treasury. The position of the judge is to be so respected that the parties of the case to be arbitrated, whoever they may be (even a caliph, as the history of Amir ul-

Muminin, Ali, so clearly shows), must both present themselves before the judge with perfect respect for his position and in no way expect or demand partiality. Confession, testimonial and, in some cases, oaths play an important role in the Islamic arbitration system.

9- The Book of Testimony

This book is connected to the Book of Arbitration in the same way that the Book of Confession is. If a person claims something, the other party either admits it or denies it. If he admits it, this is sufficient for the claim of the claimant to be proved and for the arbitrator to reach his verdict. If he denies it, the claimant is bound to produce testimony, and if he produces the testimony and it meets the conditions stipulated in the Shari'ah, his claim is proved. The denier is not bound to produce testimony.

In certain circumstances, the denier is bound to swear an oath, and if he swears an oath his prosecution is to go no further. In jurisprudence, it is said, "Testimony upon the claimant, and an oath upon whoever denies it." The issues of arbitration are so many that books have been written solely on this subject that are as voluminous as some of the great books written on all the subjects of jurisprudence.

10- The Book of Punishments (*hudud* and *t'azirat*)

This book is about Islamic punishments in the same way that the previous two books were about Islamic arbitration. Some of the systems of punishment have been precisely defined and determined in Islam, and these are to be performed in the same way regardless of the conditions and any other factors. These types of punishments are called *hudud*. There are a few punishments, however, that the Shari'ah considers to depend on the view of the Hakim [9], who, by taking into consideration the causes and conditions of the crime and any motivating factors or factors that make the crime more serious, enforces a punishment in accordance. These punishments are called *ta'zirat*.

The crimes for which *hudud* have been stipulated are adultery, homosexuality (including lesbianism), falsely accusing a person of committing one of these crimes-drinking alcohol, stealing and armed civil disturbance, which are all considered crimes against God. Although these have all been greatly misunderstood both inside and outside the Islamic world, they are detailed and here is not the place to discuss them more. It must be mentioned, however, that if a certain punishment has not been introduced in the Shari'ah amongst the *hudud*, the Islamic government must introduce punishments according to what it considers to be in the best interests. These punishments are amongst the *t'azirat*.

11- The Book of Retaliation (*qisas*)

Qisas is also a type of punishment, but for offences wherein one person criminally ends the life or harms the body of another person. In reality, *qisas* is the right Islam gives to the offended person or to his heirs if the offense leads to the offended person's death.

Such offenses are either murder or loss or impediment of a part of the body, and are either intentional (*amd*), similar to intentional (*shabih amd*) or purely a mistake (*khata mehd*).

An intentional offense is that the offense was committed with the intention to commit it, such as a person who intends to kill another person and attacks him and kills him, whether or not the attack was made with a special weapon of attack, like a sword or a gun, or whether made with something else, such as a stone. If the serious intention of the murderer was to kill the other, and this in fact he does, this is enough for it to be ruled as "intentional ".

An offense that is "similar to intentional" is that the intention is to do the act but not to do the harm which the act causes. An example of this is that a person with the intention of-hurting another person hits him with a club, which results in the victim's death. Another example is that someone hits a child in their way of teaching a lesson and the child dies. Also in this status is the case of the doctor who treats his patient for a certain disease and the treatment causes the patient to die.

Purely a mistake, however, is that there was no intention at all, such as the killing of someone by a person who was only cleaning his rifle and it accidentally fired a shot, or by a person who was only driving his car quite normally in the street.

In the cases of intentional killing or similar to intentional killing the heirs of the deceased have the right of *qisas*, meaning that under the supervision of the Islamic government, and at the discretion of the nearest of kin, the killer can either be executed or forced to pay recompense but in the case of merely a mistake the killer is not to be executed and is only obliged to pay the heirs the *diyah*, the financial recompense.

12- The Book of Financial Recompense (*diyah*)

Diyah is like *qisas* in that it is a right of the offended person or the heirs of the offended person upon the offender, with the difference that *qisas* is a way of taking payment in kind while *diyah* is a financial penalty. The laws of *diyah* like the laws of *qisas*, are very detailed.

Under the books of *qisas* and *diyah*, the jurisprudents have gone into the question of the liability of doctors and of teachers.

About doctors they say that if the doctor is not proficient and makes a mistake in his treatment of the patient that leads to the patient's death, he is liable. And, if he is proficient and he treats the patient without the patient's permission or the permission of the patient's nearest of kin, and the treatment leads to the patient's death, he is again liable. If the doctor is proficient, however, and he treats the patient with the permission of that patient, or of the patient's nearest of kin, he must first make the condition to the patient or to the heirs that he will do his utmost, but that, should his efforts happen to lead to the patient's death, he is not responsible. In this case, supposing that the patient dies or suffers some physical loss, the doctor is not liable and not subject to *qisas*. If, however, he does not make this condition before beginning the treatment, some of the jurisprudents say that he is liable.

Likewise, if a teacher unnecessarily hitting a child leads to the child's death or damage to the child's body, the teacher is liable. If, however, it is really in the child's best interest to be punished, and this should happen to lead to the child's death or damage to the child's body, the teacher must have taken permission to punish him from the

child's guardians, otherwise he is liable.

Translator's Epilogue

From the brief introduction to the issues of jurisprudence that has been given here, it is to be seen how jurisprudence, like the Shari'ah itself, enters into all the aspects of Islamic life, a necessity if life is going to be Islamic.

One of the results of this has been that there has never been general agreement as to how the different issues of jurisprudence (or, in other words, the laws of Islam) should be classified, as to justly arrange and classify the different aspects of life, even Islamic life, is very difficult. After the success of the Islamic revolution in Iran, however, a new development has taken place in this regard, which, although such classifications are of minor importance, and although it is yet to be seen how this new classification can be adapted to the existing classifications, promises to revolutionise the outward appearance of jurisprudence.

The new classification is wonderful in its simplicity. It divides all the Islamic laws and legislations into four groups, under the headings of "Worship and Self-Perfection", including the issues of cleanliness, ritual prayer, fasting and the *Hajj*; "Economic Affairs", which includes *khoms*, *zakat*, endowment, partnership, etc.; "Family Affairs", including marriage, divorce, wills and inheritance; and "Political Affairs", which includes arbitration, Islamic punishments, the jihad of defense and so on.

As has been said, the sum of the Islamic teachings are basically divided into three: knowledge of the unseen reality, knowledge of the perfection of one's inner self, and knowledge of the perfection of one's external actions. Perhaps the reason why of all three it is the least important external actions that have been given such importance within the schools is that they are less inherent than belief and virtue and are, therefore, more demanding of the intellectual capacities, and are dependent upon the other two. That is a person having some knowledge of God, Prophethood, Imamate and the Hereafter, may become engaged solely in the struggle to purify himself, attaching no more concern to his external actions than ensuring that they accord to his moral values. A person who has a mastery of the external laws of actions, however, cannot be without sure knowledge of the realities and sublime moral excellence. To learn and act according to the Shari'ah without certainty or at least profound and sincere belief, without moral excellence and without a well trained intellect is almost impossible. If one has scant knowledge of the realities, or has knowledge of the realities but little virtue, one will never see the point of adhering to the intricacies of living according to the Shari'ah.

Therefore, although the teaching of jurisprudence is the centre of all the religious institutions, the two more urgent studies also have their place. If the students of jurisprudence did not themselves develop their knowledge of the realities and of self-perfection, there simply would not be any students of jurisprudence; the laws of the Shari'ah would be forgotten and many of the words and commands of God, the Prophet and Imams would no longer be acted upon because they would no longer be understood.

Notes:

1- *faqih*at is the feminine plural of *faqih*, meaning, therefore, female jurisprudents.

2- The other being Najaf, despite the way it has been weakened and reduced by the Ba'ath regime of Iraq.

3- A *thimmi* kafer is a *kafer* (non-Muslim) who lives in peace in the Islamic state in accordance to the laws and subject to the benefits it accords him, and no other *kafer* is allowed to live in an Islamic state.

4- *ihram* is a state which one binds upon oneself wherein many things become forbidden for one. During the *Hajj* and *umrah* it accompanies the wearing of two plain white, unsewn pieces of cloth.

5- *Mehr* is like a dowry in reverse, i.e. it is the agreed sum to be paid by the man to the woman as a condition of their marriage.

6- A point about *nathr* which the author has not mentioned is that it is often made as a promise to do some good deed or deeds in return for a requested favour. In this case, the *nathr* only becomes obligatory when God has granted that favour.

7- Shrimps, however, are ruled as sea-locusts, and are permissable to eat, provided, like fish, they are taken from the water live.

8- i.e. half a *mithqal*-an eastern measurement.

9- The Hakim Shari'ah is, as we have seen, either a mujtahid meeting the conditions of being just, etc. or his representative, who, in cases needing what in English is called a magistrate, assumes this responsibility.